THE

REVISED STATUTES

OF THE

STATE OF INDIANA,

PASSED AT THE

THIRTY-SIXTH SESSION OF THE GENERAL ASSEMBLY;

INCLUDING

COURTS, THEIR JURISDICTION,

AND PRACTICE THEREIN.

VOLUME II.

PRINTED AND PUBLISHED ACCORDING TO LAW.

INDIANAPOLIS:
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1852.

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NOTE.

The indexes to this and the preceding volume of the Revised Statutes, were prepared by the Secretary of State, and are conceded to be full and accurate. The marginal and foot notes of both volumes, and the head notes and appendix of the second volume, were made out and arranged by the undersigned, who also read the proof-sheets of that volume. This labor has been performed since the 20th of last June. It cannot be expected, therefore, that the work will be free from the evidences of haste.

The foot notes, it will be seen, are collected from the decisions of various courts, and from elementary treatises. It was often difficult to determine to what extent a point decided was affected by the new code of civil procedure. In such instances, where the question turned upon the validity of a plea as a bar to an action, a syllabus of the case is given, since it affords an analogous rule as to the evidence for the defense.

Conceiving it to have been the manifest intention of the Legislature that the Statutes should be adapted to the comprehension of subordinate judicial and ministerial officers, many decisions are noted with particular reference to that object. For that purpose, there is, also, added in an Appendix to this volume, a compilation of leading rules concerning the most important subjects of law. This was contracted within narrower limits than at first designed, in consequence of the volume being larger than was anticipated.

JAMES S. HESTER.

INDIANAPOLIS, December 31, 1852.

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CERTIFICATE.

OFFICE OF SECRETARY OF STATE,
INDIANAPOLIS, DECEMBER 31, 1852.

I, CHARLES H. TEST, Secretary of State, do hereby certify, that the Statutes contained in this volume have been examined and compared with, and are found to be correctly printed from, the enrolled Statutes on file in my office, with the exception of the words included [thus] inserted to aid the sense.

In witness whereof, I have hereunto set my hand, and affixed the seal of the State, at the city of Indianapolis, this 31st day of December, A. D. 1852.

[SEAL.]

CHARLES H. TEST,
Secretary of State.

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COMPENDIUM OF THE SECOND VOL. OF R. S., 1852.

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SECOND VOLUME

OF

REVISED STATUTES OF 1852,

INCLUDING

COURTS—THEIR JURISDICTION, AND PRACTICE THEREIN.

PART FIRST.

CONCERNING THE ORGANIZATION OF COURTS—PROVIDING FOR THE ELECTION OF THEIR OFFICERS, AND PRESCRIBING THEIR GENERAL DUTIES.

CHAPTER 1.

AN ACT to organize a Supreme Court and prescribing certain duties of the Judges thereof.

[APPROVED MAY 13, 1852.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, The supreme court shall consist of four judges, any three of whom shall form a quorum, and shall have jurisdiction in appeals co-extensive with the State. Judges.

SEC. 2. The supreme court shall have a seal, devised by the judges thereof, a description of which, shall be recorded in the office of the Secretary of State. Seal.

SEC. 3. The supreme court shall be holden in the State House; but the judges of said court may, at any time during the term, adjourn to any other room in Indianapolis, and may occupy any of the rooms of the building of the Governor's circle belonging to the State, for consultation. Where holden.

SEC. 4. There shall be two terms of such court in each year, one commencing on the fourth Monday in May, the other commencing on the fourth Monday in November; and each term shall consist of thirty days, and be enlarged if the business thereof require it. Terms.

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Authority of court.

SEC. 5. Such court shall have authority,

First. To frame, direct, and cause to be used, all process; to establish modes of practice which may be necessary in the exercise of its authority; and make regulations respecting the same, and cause them to be printed.

Second. To establish regulations respecting bonds required in appeals to such court; the amount of the penalties thereof; and for approving sureties thereto.

Third. To establish regulations in relation to giving notice to officers of inferior courts of the granting of stay of execution, or of supersedeas.

Fourth. To establish regulations respecting proceedings which are requisite in such court in the exercise of its authority, not specially provided for by law.

Oaths, fines, &c.

SEC. 6. Such court shall have full power to impose and administer all necessary oaths; to punish by fine and imprisonment for contempt of its authority and process; and to compel the attendance of witnesses by attachment and fine.

Chief justice.

SEC. 7. Such judges, at each term, shall choose one of their number chief justice, who shall preside at the consultations of such judges, and in court; but no judge shall be chosen to preside at two terms consecutively, nor until the other judges have each presided one term.

Commencement of term of office.

SEC. 8. Such judges shall commence their term of office on the first Monday in January, after their election.

May preside where the circuit judge is incompetent.

SEC. 9. Such judges, in their respective districts, may preside at the trial of any case pending in any county thereof, wherein the circuit judge is incompetent to preside.

CHAPTER 2.

AN ACT providing for the election and prescribing certain duties of the Clerk of the Supreme Court.

[APPROVED MAY 13, 1852.]

Election, bond and term of office.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. At the next annual general election, and every four years thereafter, there shall be elected by the voters of the State at large, a clerk of the supreme court, who shall give bond in the penal sum of two thousand dollars, and hold his office for the term of four years.

Duties.

SEC. 2. Such clerk shall reside, and keep his office open, in a building provided for that purpose by the State, at the seat of Government, from the hour of nine A. M., until four

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P. M., of every day in the year, Sundays and the fourth of July excepted; procure and preserve in such office all records and other books, and stationery, required by the court; attend in person or by deputy, the terms of such court; administer all oaths authorized by law; sign and seal with the seal, and issue all process required to be issued from such court, under his hand; indorse the time of filing any books, records or writings required to be filed or deposited in his office, and make a complete record of all causes finally determined in such court, except the transcript of the court below.

Compensation.

SEC. 3. On presenting an account therefor, specifying each item thereof, to the truth of which he shall take and subscribe an oath, to be administered by some judge of such court, to be thereunto attached, such clerk shall be allowed by such court a reasonable compensation for the record books and stationery furnished by him for the use thereof.

Auditor to issue warrant.

SEC. 4. Such allowance shall be entered on the order book of such court, and on a certified transcript thereof, signed by some judge, and attested by the seal of such court, being presented to the Auditor of State, he shall issue his warrant therefor to the Treasurer of State.

To certify opinions.

SEC. 5. Such clerk shall certify the opinion and decision of such court to the court below from whence the cause came, under such regulations as may be prescribed by law and such court.

Judge to inspect office.

SEC. 6. Such court shall annually appoint one of the judges thereof to inspect the office of such clerk, and to report at the next term, the condition of the records and books thereof, which report shall be entered on the order book of such court.

SEC. 7. Such clerk, at the expiration of his term, shall hand over to his successor, all the books and papers of his office.

CHAPTER 3.

AN ACT to provide for the appointment of a Sheriff of the Supreme Court, and prescribing certain of his duties and fees.

[APPROVED MAY 13, 1852.]

Appointment, bond, and term of office.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. On the second Monday of January, 1853, and every two years thereafter, the supreme court shall appoint

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a sheriff thereof, who shall give bond in the sum of five thousand dollars, with sureties to be approved by such court, and hold his office for two years; and, if a vacancy in such office occur in vacation, any two of the judges of such court may appoint a sheriff to serve until the next term of the court, when such vacancy shall be filled by a vote of a majority of the judges thereof.

Duties.

SEC. 2. Such sheriff, by himself or deputy, shall attend such court in term time, execute all the orders thereof, preserve order therein, and execute, by himself or deputy, all process issued out of such court.

Transmit process to another county.

SEC. 3. When any process, rule or order, shall come into the hands of such sheriff, he may transmit the same by mail to the sheriff of the county where the same is to be served, and the sheriffs of each county shall be his deputies, but shall be liable on their own bonds for all acts done by them as such deputies.

Process to sheriff of supreme court.

SEC. 4. Such county sheriff may enclose any process, rule or order of such court, which has come to his hands, direct it to the sheriff of the supreme court, and deposit it in a post office in his county, ten days before the return day thereof, when he shall be exonerated from any liability for failing to return such process, rule or order; and, if any money is to be returned with such process, such deputy sheriff may transmit the same by mail therewith; but the testimony of the postmaster that the same was duly mailed, shall be necessary to exempt him from liability

Mileage and fees.

SEC. 5. The mileage and fees for service of any process, rule or order, issued out of the supreme court, shall be the same as in case of similar writs from the circuit court; and when they are served by the county sheriff, he shall be allowed the fees for mileage, and one half of the fees for service, and the remaining half of the fees for service shall be paid the sheriff of the supreme court; but fees for mileage shall be charged only from the county seat of the county in which the process is to be served, to the place of service; and when money shall be collected on such process, by the county sheriff, two-thirds of the poundage thereon shall go to him and the remaining third to the sheriff of the supreme court.

Postage.

SEC. 6. Such sheriff of the supreme court shall pay the postage going and returning on such process, tax and recover the same as part of the costs of the proceeding.

Coroner or deputy.

SEC. 7. Such sheriff of the supreme court may require the coroner of any county to act as such deputy, where the sheriff thereof is interested.

Penalties and liabilities.

SEC. 8. Such sheriff of the supreme court shall be subject to all the penalties and liabilities of sheriffs of the circuit courts.

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Courts, Circuit—Judge of.

Compensation.

SEC. 9. On the sheriff of the supreme court filing a statement thereof, specifying each item of his account, to the truth of which he shall have taken and subscribed an oath administered by the clerk of such court, such supreme court shall allow such sheriff a reasonable compensation for fuel, stationery, and extra services; which allowance shall be entered on the order book of said court, and on the presentation of a certified copy of such order, attested with the seal of such court, to the Auditor of State, such auditor shall issue his warrant therefor to the Treasurer of State.

CHAPTER 4.

AN ACT providing for an organization of Circuit Courts, the election of Judges thereof, and defining their powers and duties.

[APPROVED JUNE 1, 1852.]

Circuits.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. The State shall be divided into ten circuits, for each of which a circuit judge shall be elected, by the voters thereof, at the usual State election in October.

Style of court.

SEC. 2. Each court held in the respective counties of such circuits, shall be called and styled "——— circuit court," according to the name of the county in which it may be held.

When judge is interested in a suit.

SEC. 3. Whenever any such judge shall have a pecuniary interest in, be a party to, or be related by kindred or marriage, or of counsel to any party in any trial in the court of any county of which he shall be judge, if either party in such trial object to such judge presiding therein, he shall appoint a time during the vacation of such court, and give ten days' notice thereof to some other judge of a court of record, who shall, at the usual place of holding courts in such county, and at the time designated by such disqualified judge, not exceeding thirty days after the service of process, or, in appeals, after the discovery to him of his disability in such suit, attend at and preside therein, subject to all the regulations governing circuit courts in trials of similar cases, with power to adjourn from time to time: for which such judge so presiding, upon presenting his account, to the truth of which he shall take and subscribe an oath attached thereto, shall receive such compensation as the Governor, Secretary, Auditor and Treasurer of State shall deem reasonable, not exceeding five dollars per day for each day served.

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Failure to attend, who to appoint.

SEC. 4. If, from any cause, any judge of a circuit court shall be unable to attend at any term thereof, such judge, or in his absence, or when he shall be unable to make such appointment, the clerk, auditor and sheriff of such county, may appoint, in writing, any other judge of a court of record, or any attorney thereof, to preside at such term: such written appointment being entered on the order book of such court; and such appointee shall conduct the business of such court under the same regulations as provided by law, and have the same authority as the judge elect: and shall be allowed five dollars for every day he shall so serve, and in going to and returning from the place of holding such court, to be paid out of the annual compensation of such judge, upon a certificate of the number of days served by such appointee, signed and attested by the clerk of such court, being presented to the Auditor of State, who shall issue his warrant to the Treasurer of State for the amount due.

Jurisdiction.

SEC. 5. Such circuit courts, in their respective counties, shall have original, exclusive jurisdiction of all cases of slander, libel, breach of marriage contract, and when the title to real estate shall be in issue, and in all other civil actions where the amount involved is one thousand dollars or upwards; and concurrent jurisdiction when that amount is under one thousand dollars, except as otherwise provided by law, and original, exclusive jurisdiction in all felonies, and such appellate jurisdiction as may be prescribed by law.*

Frame new writs.

SEC. 6. They shall have power to issue and direct all processes to courts of inferior jurisdiction, and to corporations and individuals, which shall be necessary to the regular execution of the law.

Process.

SEC. 7. Where there shall be occasion for any process for which no form is prescribed by law, such courts shall frame a new writ in conformity with the principles thereof.

Powers.

SEC. 8. Such courts shall have power to make all proper judgments, sentences, decrees, orders, and injunctions, and

*The circuit court cannot take cognizance of a matter of controversy or suit unless the same be brought before it by process of law or other legal proceedings.—*Hoover* vs. *Hanna*, 3 Blackf. 48.

If a court, either of law or chancery, have no jurisdiction of the *subject matter* in controversy, it can render no valid judgment or decree upon the merits of the cause.—*Bryan* vs. *Blythe et al.*, 4 Blackf. 249.

Whether the declaration shows a sum due, sufficiently large to give the circuit court jurisdiction, depends not upon the amount of any one particular item, but upon the whole amount demanded in the declaration.—*The State Bank of Indiana* vs. *Brooks*, 4 Blackf. 485.

If the different charges against a clerk for taking unlawful fees, amount, together, to the sum necessary to give the circuit court jurisdiction, the demand may be sued for in that court.—*Jones* vs. *Buntin*, 1 Blackf. 322.

See Civil Code, R. S., vol. 2, title, "jurisdiction."

A transitory action may be commenced against a single defendant in the circuit court of any county in which he may be found.—*Wynn* vs. *Kiser*, 7 Blackf. 299.

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to issue all processes, and to do such other acts as may be proper to carry into effect the same, in conformity with the constitution and laws of this State.

When subject matter is in two counties.

SEC. 9. When the subject matter of any such court shall be situate in two or more counties, the court which shall first take cognizance thereof shall retain the same.

Commissioners to examine witnesses.

SEC. 10. Such courts shall also have power and authority to grant commissions for the examination of witnesses, according to the regulations of law.

Seal.

SEC. 11. The circuit court of each county shall have a seal, a description of which, signed by the judge devising the same, shall be filed by the clerk, and recorded.

Seals of new counties.

SEC. 12. In all new counties, where seals for the circuit courts thereof have not been devised, it shall be lawful for the clerks thereof to seal all papers, where the seal of such court shall be required by law, with his own private seal, and the same shall have like force as if it had been sealed with a seal devised by such court.

Oaths.

SEC. 13. The said circuit courts, respectively, shall have full authority to administer all necessary oaths, and to punish, by fine and imprisonment, or either, all contempts of their authority and process in any matter before them, or by which the proceedings of the court, or the due course of justice, is interrupted.

Rules.

SEC. 14. The said courts shall adopt rules for conducting the business therein, not repugnant to the laws of this State, and in everything relating to simplifying and expediting the proceedings and decisions of causes, presenting distinctly the points in issue in trials by jury, diminishing costs, and remedying imperfections that may be found to exist in the practice, the rules of such court shall be in conformity with those prescribed by the supreme court on the same subject.

Recognizances to keep the peace.

SEC. 15. The judges of such circuit courts, within their respective districts, shall take all necessary recognizances to keep the peace, or to answer any criminal charge, or offence, in the court having jurisdiction.

No discontinuance, when.

SEC. 16. There shall be no discontinuance of any suit, process, matter, or proceeding whatever, returnable to, or pending in any circuit court, by reason of a failure of the judge to attend on the first or any other day of the term.

Judge failing to attend, clerk or sheriff to adjourn court.

SEC. 17. If such judge shall not attend, the clerk or sheriff may adjourn the court for two days successively; and, if such judge shall not attend on the third day, or having attended one day, shall fail to attend for three successive days of the term, the court shall stand adjourned until court in course; unless a judge *pro tempore* has been appointed as herein provided.

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SEC. 18. If a court shall not sit in any term, all matters depending therein shall stand continued until the next term.

Matters continued.

SEC. 19. If, at the end of the term of any court, any matters depending therein are undetermined, the same shall stand continued until the next term.

Elisor.

SEC. 20. If, at any time, whether during term time or in vacation, there shall be no sheriff nor coroner to attend, or if the sheriff and coroner shall both be incapacitated from serving, such court shall have power to appoint an elisor to serve during the pendency of the matter in which such officer may be disabled from serving.

Oath and bond of elisor.

SEC. 21. Such elisor shall take the like oath and give the like bond and surety as are required of sheriffs, and shall have the same authority to perform all the duties of the sheriff which shall relate to the service for which he may be thus specially appointed, and shall be governed by the same rules, and be subject to the like penalties and liabilities.

Proceedings to be entered and signed.

SEC. 22. It shall be the duty of the clerk of the circuit court to draw up each day's proceedings at full length, and the same shall be publicly read in open court, after which they shall be signed by the judge; and no process shall issue on any judgment or decree of the court until it shall have been so read and signed. *

* An entry on the record of the circuit court, of a decision of the supreme court, in a case taken by appeal from the circuit court, is necessary before the last named court can act in the cause remanded from the supreme court.—*Glover* vs. *Foote*, 7 Blackf. 293.

When the cause has been tried by the court instead of a jury, the record should show that the cause was submitted to the court by the parties.—*Mahan et al.* vs. *Sherman*, 7 Blackf. 378.

CHAPTER 5.

AN ACT providing for the election of Clerks of the Circuit Court, and prescribing some of their duties.

[APPROVED JUNE 7, 1852.]

Election, term and bond.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That, at the general election, immediately preceding the expiration of the term of the present incumbent, and every four years thereafter, in each county, there shall be elected a clerk of the circuit court, who shall hold his office during such term, and who shall give bond in the penal sum of ten thousand dollars.

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To keep office open, when and where.

SEC. 2. Such clerk shall keep his office open at the county seat, in a building provided for that purpose by the board of commissioners of the county, every day in the year, Sundays and the fourth of July excepted, between the hours of nine A. M., and four P. M., where, by himself or deputy, he shall attend to the duties of his office, not otherwise provided for.

Duties.

SEC. 3. Such clerk shall endorse, under his hand, on all writings required to be filed in his office, the time of filing thereof; carefully preserve in such office, all records and writings appertaining to his official duties; procure, at the expense of the county, all necessary judges', appearance, bar, judgment, and execution dockets, order, and final record books, and a book in which he shall register the names of all county and township officers, whose bonds are filed with him; when they were commissioned; when they qualified and gave bond; the names of sureties; expiration of the terms of such officers, and the time of the occurring of a vacancy; attend, in person, or by deputy, the circuit and common pleas courts of such county; enter, in the proper record books, all orders, judgments, and decrees of such courts, and in final record books, within one month after the same are finally determined, a complete record of all causes where the title to land is involved, and of all criminal causes where the punishment is death or imprisonment, except where a *nolle prosequi* is entered, or an acquittal is had, and in all other cases, at the request of either party, on payment of costs therefor; but such clerk shall not become the purchaser of any judgment, decree or allowance of any court of which he is an officer, and all such purchases shall be void as to the purchaser.

Not to purchase judgments.

Force of entries, &c., certified to.

SEC. 4. In all cases where a complete record is dispensed with, the production of the papers and entries relating thereto, and all transcripts thereof, certified and attested with the seal of such court, as complete copies of all the papers and entries of such cause, shall have the same force in evidence as a transcript of a complete record thereof.

Oaths.

SEC. 5. Such clerk shall have power to administer all oaths.

Extra allowance, for books, &c.

SEC. 6. Such circuit and common pleas courts shall allow reasonable sums to such clerk for necessary blank books and stationery, upon his filing a written specification of each item, sworn to before the county auditor, an entry of which allowance shall be made in a book to be provided for that purpose by such clerk; and upon a copy thereof, signed by the judge of the court in which the same is made, and attested by the seal thereof, being presented to him, such auditor shall issue his warrant upon the treasurer of the county for the amount of such allowance.

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To make out list of jury, witness' fees, and fines.

SEC. 7. Such clerk, on or before the first day of January of each year, shall make out and file with the treasurer of the county, a complete list of all fines, jury fees and witness fees which have remained unclaimed for one year, assessed during the preceding year, the amount collected, and of whom, to the truth of which he shall take and subscribe an oath to be thereto attached and administered by such treasurer; and shall pay to such treasurer, upon the receipt thereof, all money so collected; and shall make out a copy of such list, in like manner sworn to and filed with the county auditor, who shall enter the same on the order book of the board of commissioners.

Judge to examine office.

SEC. 8. The judge of such circuit court shall, on the first day of every term, examine such clerk's office, and in writing report the manner in which the books and papers thereof are kept, to the truth of which he shall take and subscribe an oath, to be administered by such auditor, which report shall be entered on the order book of the board of commissioners.

SEC. 9. Such clerk, at the expiration of his term, shall deliver to his successor all the records, books and papers belonging to his office.

CHAPTER 6.

AN ACT providing for the election of County Sheriffs, and prescribing some of their duties.

[APPROVED JUNE 7, 1852.]

Election—term of office—bond.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. At the general election immediately preceding the expiration of the term of office of the present incumbent, a sheriff shall be elected in each county to serve during the term of two years, and shall give bond in the penal sum of five thousand dollars, and take the usual oath of office.

Duties of sheriff

SEC. 2. Such sheriff shall be a conservator of the peace within his county, and shall arrest without process, all persons who, within his view shall commit any crime or misdemeanor, take them before the nearest justice of the peace of the county and detain them in custody until the cause of such arrest has been investigated; suppress all breaches of the peace within his knowledge, having hereby given him

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authority to call to his aid the power of the county; pursue and commit to the jail of the county all felons; execute all process directed to him by legal authority, either in person or by deputy, attend upon and preserve order in all courts of record of his county, except justices' courts; take care of such jail and the prisoners therein; and serve all process directed to him from the circuit or common pleas court, or from the board of commissioners according to law.

When no provision is made for service of process.

SEC. 3. When no provision is otherwise made for the service of process, in any county from any court, the sheriff of such county shall serve the same.

Deputies.

SEC. 4. Such sheriff may appoint deputies, and shall be responsible for their acts as such; and may also appoint a sufficient number of baliffs to attend upon the circuit and common pleas courts of his county, who shall be allowed a reasonable amount for their services by such court; and upon the presentation of a copy of such allowance, certified by the clerk of such court to the auditor of the county, such auditor shall issue his warrant therefor, to the county treasurer.

Extra allowance.

SEC. 5. The board of commissioners of such county, on a written specification of each item of such charge, subscribed and sworn to before, and attested by the clerk of the circuit court, shall allow such sheriff a reasonable compensation, not exceeding one hundred dollars annually for all extra services.

Not to purchase judgments, &c.

SEC. 6. Such sheriff shall not become the purchaser of any judgment or allowance, in any court of which he is an officer.

Exhibit of executions.

SEC. 7. At the term of the circuit court next after the first day of July of each year, such sheriff shall make an exhibit in writing of all executions and other process in his hands; what levies he has made; the amount of money collected on each execution; and when service thereof was made; to the truth of which he shall take and subscribe an oath; which report shall be entered on the order book of such court.*

* If a sheriff be guilty of mal-practice in the discharge of his duty, relative to an execution, the court may, upon an attachment for contempt, commit him to prison or fine him; and then refuse to discharge him or remit the fine, unless he make satisfaction to the judgment creditor.—*The State* vs. *Tipton*, 1 Blackf. 166.

When it appears by the sheriff's return of an execution, that he has made the money, he and his sureties are liable without a previous demand.—*Dawson* vs. *Shaver et al.*, 1 Blackf. 204.

In an action against a sheriff for a false return, the execution is admissible in evidence, though it do not specify the day on which it is returnable.—*Bosley* vs. *Farquar et al.*, 2 Blackf. 61.

The sheriff's return to a *fieri facias* was, that he had not levied because the plaintiff would not give him an indemnity. *Held*, that this return was unknown to the law, and that the cause must stand as if no return were made.—*Ibid.*

Even if such indemnity could be required in any case, it should be deman-

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ded as soon as the circumstances authorizing the demand were known to exist.—*Ibid.*

If the sheriff in consequence of vague rumors as to whether certain goods are the debtor's, return "no property" without having the right of property tried by a jury, he will be liable for a false return, on proof that the goods were subject to the execution.—*Ibid.*

If it appear that a person has acted personally as a deputy sheriff, with the sheriff's knowledge and consent, the sheriff is liable for the official acts of such person, though he may not have given him any express authority.—*Ibid.*

If a sheriff take and sell the property of A. on an execution against B., he is liable to the owner in trespass or trover, without demand.—*Jamison* vs. *Hendricks*, 2 Blackf. 94.

A sheriff's acknowledgment that he had collected money on an order of sale, cannot be proved to sustain an action for the money against the sheriff's surety, unless the acknowledgment was made whilst the sheriff was acting officially in relation to the receipt of the money.—*Shelby* vs. *The Governor*, 2 Blackf. 289.

In case a sheriff is re elected his first sureties are not liable after receipt of his new commission.—*Rany et al.* vs. *The Governor*, 4 Blackf. 2.

If a sheriff fail to return a *capias ad satisfaciendum* on or before the return day thereof, the execution creditor may proceed against him under the statute by notice and motion.—*Phillips* vs. *Vickers*, 2 Blackf. 281.

A sheriff who seizes property by virtue of an execution, and does not sell the same within a reasonable time, is liable for his non-feasance to the party injured, unless he have a legal excuse.—*The State* vs. *Herod*, 6 Blackf. 444.

In debt on a sheriff's bond, the breach assigned was, the sheriff's failure to return a *fieri facias*. Plea, that on the return day of the execution, and for six days before, the sheriff was sick, and thereby rendered incapable of returning thewrit, or of attending to the duties of his office, and so continued until his death. *Held*, that the plea was good.—*The State* vs. *Guard et al.*, 6 Blackf. 519.

In assumpsit against A., B., C. and D., the sheriff returned the writ served as to A. and B., and "not found" as to C. and D., but stated in his return that he did not go to the house of D. by order of plaintiff's attorney. *Held*, that there was no legal return of "not found" as to D.—*Lodge et al.* vs. *State Bank*, 6 Blackf. 557.

In debt on sheriff's bond the breach assigned was an escape on execution. *Held*, that it was too late, after issue joined, the plaintiff's testimony closed, and a witness examined by the defendants, to permit the sheriff to amend his return to the execution. *Held*, also, that evidence for the defendants of the execution-debtor's insolvency at the time of his arrest and escape, was admissible. *Held*, also, that the defendants could not introduce parol evidence to contradict the sheriff's return. *Held*, also, that the measure of damages was the amount of the execution and costs.—*Lines et al.* vs. *The State*, 6 Blackf. 464.

See *Meriam et al.* vs. *The State*, 7 Blackf. 245; also, *The State* vs. *Cromwell et al.*, 7 Blackf. 70.

A sheriff having collected money on an execution, died without having paid over the money, and the judgment was afterwards reversed. *Held*, that a suit on the sheriff's bond on the relation of the execution-defendant, against the sureties of the sheriff, for the money so collected, would not lie.—*The State* vs. *Vananda et al.*, 7 Blackf. 214.

That part of a sheriff's return to an execution of his having sold certain land, which names the day of sale, is not material, and may be contradicted by parol evidence.—*Goodtitle d. of Cook* vs. *Cummins*, 8 Blackf. 179.

A sheriff sold a tract of land, susceptible of division, worth $20,000, on execution, for $75. There were but four persons present at the sale. *Held*, that the sheriff should have offered the land in separate parcels, and it was his duty to have exercised a sound discretion, and should not have struck off the property merely for a nominal sum.

Objections to a sheriff's sale may be made in an action of ejectment.—*Sherry* vs. *Nick of the Woods*, 1 Carter's Ind. Rep. 575.

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Coroners—bond—powers—duties—inquests.

CHAPTER 7.

AN ACT prescribing the powers and duties of Coroners.

[APPROVED MAY 27, 1852.]

Coroner, how commissioned

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That every coroner shall be commissioned by the Governor, and before entering upon the duties of his office, shall execute an official bond in the penalty of five thousand dollars, and shall, within his county, be a conservator of the peace, and perform like duties, and possess like powers, in keeping the peace, and in arresting offenders against the laws of the State, and in suppressing affrays, and breaches of the peace, which may come to his knowledge, which are vested in sheriffs.

Bond.

To be conservator of the peace, &c.

When to perform duties of sheriff.

SEC. 2. The coroner shall perform the duties of sheriff, in cases where the sheriff is interested, absent, or otherwise incapacitated from serving; and also, in case of vacancy in the office of sheriff, the coroner shall discharge the duties of such office, until a sheriff is appointed or elected and qualified.

Same.

SEC. 3. All writs and warrants commanding the arrest of the sheriff of any county, shall be served by the coroner or other person to whom the same may be legally directed; and such sheriff shall be committed to the jail of the county of which he is sheriff, by the coroner; and such coroner, during the imprisonment of such sheriff, shall have the custody of such jail and of the prisoners therein, and shall discharge the duties of sheriff until such sheriff is legally discharged out of such custody.

When notified of death, shall issue warrant to constable for jury.

SEC. 4. Every coroner, as soon as he shall be notified that the dead body of any person, supposed to have come to his death by violence or casualty, is within his county, shall make out his warrant, directed to a constable of the township where the dead body is lying, requiring him forthwith to summon a jury of men of the said township not less than fifteen in all, to appear before such coroner, at the time and place expressed in his warrant, and to inquire upon view of the body (naming therein the person, if known, there lying dead) how, and in what manner, and by whom, he came to his death.

Service and return thereof.

SEC. 5. Every constable to whom such warrant shall be directed, shall forthwith execute the same, and repair to the place where the dead body is, at the time named, and make return of the warrant, with his proceedings thereon, to the coroner who granted the same.

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Oath of jury.

SEC. 6. The coroner shall administer to twelve of the jurors who appear, the following oath:

"You do solemnly swear, or affirm, (as the case may be) that you will diligently inquire, and true presentment make, how, and in what manner, and by whom A. B., who here lies dead, came to his death, and that you will deliver to me, the coroner of this county, a true inquest thereof according to such evidence as shall be laid before you, and according to the best of your knowledge."

Charge to jury.

SEC. 7. The jurors being sworn, the coroner shall give them a charge upon their oaths, to declare of the death of the person, how and by whom it was caused, and all circumstances attending the same, and whether any person is guilty of said death, and the degree of guilt.

Witnesses.

SEC. 8. All persons desirous of being heard, shall be examined as witnesses, and the coroner may cause witnesses to be summoned by subpœna, issued by him, and served by a constable; who shall answer all questions asked them on oath, touching such death. And when a surgeon or physician is required to attend such inquest and make a *post mortem* examination, the coroner shall certify such service to the board of county commissioners, who shall order the same paid out of the county treasury.

Evidence to be in writing. Recognizance of witnesses.

SEC. 9. All testimony shall be in writing, subscribed by the witnesses; and if it relate to the trial of any person concerned in the death, the coroner shall bind such witness, by recognizance, in a reasonable sum, for his appearance at the next [term of the] circuit court to be holden within the same county, there to give evidence, and commit to the jail of said county any witness refusing to enter into such recognizance; and he shall return to the same such inquisition, written evidence, and recognizances by him taken.

Verdict.

SEC. 10. The jury, having viewed the body, heard the evidence, and made all inquiry within their power, shall draw up and deliver to the coroner, their verdict upon the death under consideration, in writing, under their hands.

Description of deceased. Money, &c., when paid to treasurer.

SEC. 11. The coroner shall require the jury impanneled, to examine and make a report, signed by said jurors and said coroner, which shall be returned with the verdict of said jury, giving a particular and minute description of the person deceased, together with his name, if the same can be ascertained, and the amount of money, or other valuables, found with the dead body, which amount of money, or other property, if there be no person to take charge of the same, shall be placed in the hands of the treasurer of the county in which the said body may be found, and by him paid over to the person or persons authorized to receive the same, if any such

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person shall call therefor. But so much thereof as may be necessary, may by the treasurer be appropriated under the order of the board of commissioners to paying the burial expenses of the deceased.

Duty of treasurer.

SEC. 12. It shall be the duty of the treasurer, if the money aforesaid shall not be called for within one year from the time of receiving the same, to loan it out on interest of not less than seven per centum per annum, to be applied to common schools, equally to be divided among the townships of said county.

Coroner to publish description of deceased.

SEC. 13. It shall be the duty of such coroner to publish in some public newspaper printed in or nearest to such county, the description and name of the deceased, if the same can be ascertained, and the amount of money or other valuables, found in his possession, in cases in which no person is entitled thereto shall claim the same.

Coroner failing to pay over money. treasurer may bring suit therefor.

SEC. 14. If any coroner shall fail to pay to the treasurer of any county the money or other property which may come into his hands as aforesaid, it shall be the duty of such treasurer to sue for and collect the same in his own name, before any court having competent jurisdiction.

Further duty of coroner.

SEC. 15. Upon an inquisition found before any coroner of the death of any person by felony, such coroner shall forthwith issue to some constable his writ, commanding him to arrest the person whom such jury may charge with such felony, and take him before some justice, to be by such coroner named in such writ; and such justice shall proceed in such case, as if such person had been arrested on complaint made before him.

When justice of the peace may act as coroner.

SEC. 16. In every case where the coroner shall be absent from the county, or unable to attend, any justice of the peace of the proper county, may hold an inquest over any dead body, and shall proceed in all respects as coroners are directed to do by the foregoing provisions, and may in all cases be governed by the provisions and subject to the penalties of this act.

Sale of property found on body.

SEC. 17. The treasurer of the county shall sell, as property is sold on execution by a sheriff, all property found on any dead body, and remaining unclaimed for sixty days; and the proceeds of such sale shall be disposed of as required in case of money being found on such body.

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CHAPTER 8.

AN ACT to establish Courts of Common Pleas, and defining the jurisdiction and duties of, and providing compensation for, the Judges thereof.

[APPROVED MAY 14, 1852.

Election of judge and term of office.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That there be established a court of common pleas, embracing such county or counties as may be designated by law; which shall consist of one judge, elected by the voters of the proper district, at the annual election in October one thousand eight hundred and fifty-two, and every fourth year thereafter, who shall hold his office for the term of four years, if he shall so long behave well, and until his successor is elected and qualified.

Vacancy.

SEC. 2. In case of vacancy by death or otherwise, the Governor shall fill such vacancy by appointment until the next general election.

Districts

SEC. 3. For the purpose of electing judges for the court of common pleas, the State shall be divided into districts as follows: Posey and Gibson counties shall be a district; Warrick and Vanderburgh a district; Spencer, Perry and Dubois, a district; Pike, Knox, Daviess and Martin, a district; Crawford, Orange, Washington and Harrison, a district; Floyd, a district; Clark and Scott a district; Jefferson, a district; Switzerland and Ohio, a district; Dearborn and Ripley, a district; Jennings, a district; Bartholomew, a district; Jackson and Lawrence, a district; Clay, Owen, Greene and Sullivan, a district; Vigo, a district; Monroe, Brown and Morgan, a district; Johnson, a district; Shelby, a district; Decatur and Rush, a district; Franklin, Fayette and Union, a district; Wayne, a district; Henry, a district; Madison and Hancock, a district; Marion, a district; Hendricks and Putnam, a district; Parke and Vermillion, a district; Fountain, a district; Boone and Montgomery, a district; Tippecanoe and White, a district; Carroll and Clinton, a district; Hamilton, Tipton and Howard, a district; Delaware, Blackford and Grant, a district; Jay and Randolph, a district; Huntington and Wells, a district; Wabash and Kosciusko, a district; Miami and Cass, a district; Warren, Benton and Jasper, a district; Pulaski and Fulton, a district; Noble and Whitley, a district; Adams and Allen, a district; DeKalb and Steuben, a district; Lagrange and Elkhart, a district; Laporte, Porter and Lake, a district; and St. Joseph, Marshall and Starke, a district; in each of which districts a judge of Common pleas shall be elected as aforesaid.

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Courts, Common Pleas—jurisdiction of—when judge is interested.

Exclusive jurisdiction.

SEC. 4. The court of common pleas within and for the county or counties for which it is organized, shall have original and exclusive jurisdiction in all matters relating to the probate of last wills and testaments, granting of letters testamentary, of administration, and of guardianship; of all matters relating to the settlement and distribution of decedents' estates, and the personal estates of minors; all actions against executors and administrators; to authorize guardians to sell and convey real estate of their wards; and the appointment of guardians of persons of unsound mind; the examination and allowance of the accounts of executors and administrators, and of the guardians of minors; except where, in special cases, concurrent jurisdiction is given by law to some other court.

Concurrent jurisdiction.

SEC. 5. The circuit and common pleas courts shall have concurrent jurisdiction in all actions against heirs, devisees, and sureties of executors, administrators and guardians; in the partition of real estate; assignment of dower; and the appointment of a commissioner to execute a deed on any title bond given by a decedent.

When subject of the suit is situate in two or more counties.

SEC. 6. When the subject-matter of any suit or proceeding of which the court of common pleas may have jurisdiction, shall be situated in two or more counties, the court which shall first take cognizance thereof, by the commencement of proceedings, shall retain the same throughout exclusively.

When the cir. and com. pleas court have concurrent jurisdiction.

SEC. 7. In all suits and proceedings of which the circuit and common pleas courts shall have concurrent jurisdiction, the court which shall first take cognizance thereof, shall retain such cognizance exclusively, while the same may be pending in such court.

Who may sue in common pleas court.

SEC. 8. Guardians, executors or administrators, may sue in said court of common pleas, any and all persons against whom any claim, debt or demand of any kind whatsoever, accrues to them in such fiduciary capacity; and in all cases where executors, administrators or guardians, are plaintiffs, the common pleas shall have concurrent jurisdiction with the circuit court.

When the judge is interested.

SEC. 9. If in any case cognizable in the court of common pleas, the judge thereof may be or shall have been interested, either as counsel, executor, administrator, guardian, heir, devisee, legatee or otherwise, such case, and all matters relating thereto, shall be instituted, prosecuted and determined before the circuit court of the same county; and such court shall have jurisdiction thereof, and shall be governed in all matters and things touching the same, by the provisions of law which govern the court of common pleas in similar cases.

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Same.

SEC. 10. If during the pendency of any such suit or matter the judge of common pleas shall become disqualified to hear and determine the same, for any of the causes specified in the last preceding section, such suit or matter shall be transferred to the circuit court of such county, with the like effect as if the same had been instituted in such circuit court according to the provisions of the preceding section.

Jurisdiction in civil cases.

SEC. 11. In all civil cases, except for slander, libel, breach of marriage contract, action on official bond of any State or county officer, and where the title to real estate shall be in issue, the court of common pleas shall have concurrent jurisdiction with the circuit court, when the sum due or demanded, or the damages claimed, shall not exceed one thousand dollars, exclusive of interest and costs, and concurrent jurisdiction with justices of the peace in all cases where the sum due or demanded, is not less than fifty dollars.

Judgments confessed and by consent.

SEC. 12. In relation to judgments confessed, and in cases commenced without process, by consent of parties entered of record, or filed in the clerk's office, though the sum confessed in the one case, and due or demanded in the other, exceed one thousand dollars, the common pleas shall have jurisdiction.

Appeal.

SEC. 13. An appeal shall lie from such court of common pleas in all cases to the circuit or supreme court, at the option of the party applying therefor; and an appeal may be taken from the judgment of a justice of the peace, to the common pleas or circuit court, as the party first filing his bond therefor may elect.

Jurisdiction in criminal cases.

SEC. 14. Said court shall also have original jurisdiction in all that class of offenses which do not amount to felony, except those over which justices of the peace have exclusive jurisdiction: *Provided*, that the defendant may, at any time within ten days after the rendition of judgment against him, appeal to the circuit court, on giving bond and security to the satisfaction of the court of common pleas in a reasonable penalty, proportioned to the nature of the offense.

Proceedings in criminal cases.

SEC. 15. All criminal proceedings may be commenced in said court by filing with the clerk a written charge, verified by affidavit; on which, process shall issue for the body of the defendant, and the trial shall be by a jury, unless by agreement of the State and the defendant such jury be waived and the case submitted for trial by the summary determination of the court.

When case is discovered to be a felony, it is to be certified to the cir. court.

SEC. 16. If in the progress of the trial, the evidence, in the opinion of the judge, disclose a felony or other crime of which such court has no jurisdiction, further proceedings shall be stayed in said common pleas, and the case shall be certified to the circuit court, and the defendant held to bail

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for his appearance in such circuit court, or committed, if in the opinion of such judge the crime is not bailable.

When to have jurisdiction of felonies.

SEC. 17. Said court shall have original jurisdiction of felonies which may not be punishable with death under the following restrictions, viz: any person charged with a felony, who is in custody at the time; and, any one charged with a felony, who, before indictment found by a grand jury in any other court, voluntarily, either by personal appearance or in writing, submits to the jurisdiction of the court, which submission it shall not be competent for him afterwards to withdraw or cancel; shall be put upon trial in said common pleas, without the intervention of a grand jury, in the same manner as is herein provided for the trial of misdemeanors, and with the same powers as to judgment and execution as belong to the circuit court in cases of felony. Said court shall also have full power to try any criminal charge on change of venue from the circuit court, with the like powers and incidents as belong to such circuit court; and when the party is in custody, or voluntarily submits to the jurisdiction as aforesaid, said court shall appoint an early day for trial, either in term time or in vacation.

In such cases complaint to be filed, without a grand jury.

SEC. 18. In cases contemplated by the preceding section, the intervention of a grand jury shall not be necessary, but complaint shall be filed as in other criminal cases in said court; and in all other respects such court shall be governed by the rules of proceeding and evidence which by law or usage prevail at the time in the circuit court.

Complaint to be certain to a common intent.

SEC. 19. In criminal cases the charge or complaint provided for in the preceding sections to be filed without the intervention of a grand jury, shall be sufficient on demurrer or motion to quash, if it be certain in its allegations to a common intent.

Appeals, how tried.

SEC. 20. All appeals, whether in civil or criminal cases, shall stand for trial in the circuit court on the papers and pleadings filed by the parties in the common pleas: *Provided*, that either party may amend on such terms as to costs, as the law or the rules of such [circuit] court may prescribe.

Restraining orders, injunctions, and writs of ne exeat.

SEC. 21. The judge of common pleas within his district shall have power to grant restraining orders, injunctions, and writs of *ne exeat*, in the vacation of the circuit court, in relation to any matter pending in said circuit court, and at all times to exercise such powers in relation to cases pending in his own court or in any inferior court.

Appeal.

SEC. 22. Any party aggrieved by the decision of the judge of common pleas, in any of the cases contemplated by the preceding section, may appeal to the circuit or supreme court, on giving bond with surety to the opposite party, in such

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reasonable penalty as the court, in the exercise of a sound discretion, may direct.

Habeas corpus. SEC. 23. The judge of common pleas, within his district, shall also have power to issue writs of *habeas corpus*, and to discharge, recommit or hold to bail, as the exigencies of the case may require; and if, on examination on writ of *habeas corpus*, or on any preliminary examination, such judge is of opinion that the evidence makes out a probable case against the defendant, though it be not the crime or offense on which such defendant was committed, or on which he is charged, it shall be the duty of such judge to commit the accused, or hold him to bail, as the case may require, to answer to the crime or offense which, in the opinion of such judge is made against the accused by the evidence.

To be a court of record—lien of judgments,—executions. SEC. 24. Said common pleas shall be a court of record, and its judgments shall be a lien on real estate in the same manner as the judgments of the circuit court, and on such judgments of the court of common pleas, execution shall issue against the goods and chattels, lands and tenements, of the judgment debtor, in the same manner and under the same regulations and restrictions as govern executions in the circuit court, unless otherwise expressly provided by law.

Sheriff and clerk. SEC. 25. The sheriff of the proper county and the clerks of the circuit courts in their respective counties, shall be officers of the court of common pleas, and for their services shall be entitled to such fees as may, from time to time, be allowed in the circuit court for like services.

Records, papers and proceedings SEC. 26. The clerk shall, under the direction of such judge, provide for said court an order book, fee book, execution docket, judgment docket, and such other books as may be deemed necessary, and all the books, records, papers and proceedings of the common pleas, shall be kept distinct and separate from those of the circuit court: *Provided*, that no final record of any case in said court shall be made as of course, except in the administration and settlement of decedents' estates, and the settlements of the estates of minors, idiots, and lunatics, and in all cases where the title to land is in question by way of probate: *And provided, further*, that a final record may be made in any case where either party request it, at the proper expense of the party making such request, to be paid in advance: *And provided, further*, that all matters touching decedents' estates, wills, administrators, guardians and heirs, and all business in relation thereto, transacted in said court, shall be kept separate in proper books prepared for that purpose as heretofore.

Seal. SEC. 27. Such judge and clerk shall also devise a seal for the court, which shall contain on the face the words "common pleas of ——— county," filling the blank according to the

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name of the county, with such devices as they may think proper; and a description of such seal, together with an impression thereof, shall be spread upon the order books of such court: *Provided*, that until such seal is thus devised and adopted, the clerk may seal with his private seal or scroll all process which by law are required to be sealed.

Powers and rules.

SEC. 28. Such court shall have all the powers incident to a court of record in relation to the attendance of witnesses, the punishment of contempts, and enforcing its orders; and in this respect and in all other proceedings in said court, the rules of proceeding and practice in the circuit court, so far as the same may be applicable, shall be the rule of the common pleas, except in such matters as are otherwise provided for by law.

Number and commencement of terms.

SEC. 29. The court of common pleas shall sit at the court house of the proper county, and shall hold four terms a year, beginning with the first Monday in January annually, and then the first Monday of every third month thereafter: *Provided*, that if the circuit court of said county shall be in session at the same time, the common pleas shall be held on the Monday succeeding the term of the circuit court.

Duration of term.

SEC. 30. The terms of the court of common pleas shall be regulated as follows: In every county where the population exceeds fifteen thousand, such court may sit three weeks each term, if the business require it; in every county where the population exceeds nine thousand and under fifteen thousand, such court may sit two weeks, if the business require it; and in every county where the population is less than nine thousand, such court may sit one week each term, if the business require it: *Provided*, that the returns of the last census or enumeration, which may from time to time be made either by the authority of the State, or of the United States, shall be the basis upon which to fix the population of the several counties.

In what county first held.

SEC. 31. Where two or more counties form a common pleas district, the court shall be held as aforesaid in the largest county first, and so on in succession on the basis of population aforesaid; each term of the court in the smaller county commencing on the Monday succeeding the courts in the larger county.

When a trial is in progress.

SEC. 32. Whenever there is a trial begun and in progress at the time when by law the term of such court would expire, the term shall be deemed to extend to the close of such trial.

What clerk may do in vacation

SEC. 33. For the purpose of filing reports of executors, administrators, or guardians, and granting letters testamentary, of administration and guardianship; for filing accounts against estates, issuing process, granting orders for publication; for filing petitions by executors, administrators, or

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guardians for the sale of real estate; or for filing petitions for the settlement of any estate as insolvent; or for any order of publication, notice, or citation, incident thereto; the clerk, in the absence of such judge, shall, on every juridical day of the year, during business hours, keep the said court open by himself or deputy, subject, however, to the supervision and approval of the judge of common pleas at the next succeeding term after any such business may have been transacted in vacation.

Powers of judge in vacation in criminal cases.

SEC. 34. Suits may be commenced at any time in the same manner and on the same terms as in the circuit court; and for the trial of criminal offenses, by the consent of the State and the defendant, and for preliminary examination in criminal cases, the court shall be always open, and may be held at any place at the county seat of the proper county, if the judge sees proper to attend; and whenever such judge attends in vacation out of the county where he resides, he shall be allowed traveling expenses at the rate of ten cents per mile for necessary travel, and one dollar per day for board during all the time he may be so engaged in the vacation of his courts, to be paid by the county requiring such services; which requisition shall be made upon such judge in all cases by the auditor of the county, or the board doing county business if in session.

Marriages, deeds, depositions, &c.

SEC. 35. Said judge shall also have the power to solemnize marriages, take acknowlegments of deeds, take and certify depositions in any cause not pending in his own court, and act as an accounting officer or master in chancery in any cause referred to him by order of the circuit court, and receive the fees allowed by law or usage for such services.

Docket fees.

SEC. 36. In all cases, civil and criminal, original or on appeal, tried in said court, either by the court or by jury, a docket fee of three dollars shall be taxed against the losing party—except such losing party be the State of Indiana, or an executor or administrator as the personal representative of a decedent; and in all judgments by confession or on pleas of guilty, a docket fee of one dollar shall be taxed against the defendant. In all cases arising under the probate jurisdiction of said court, when the validity of any will may be in issue, and such issue tried either by the court or jury, a docket fee of five dollars shall be taxed against the losing party. In all cases where any person shall sue an executor or administrator as such, and shall either abandon his action before trial or be defeated upon trial, or suffer a non-suit, a docket fee of three dollars shall be taxed against him. And, if any person shall sue an executor or administrator on any claim against, or indebtedness of, the decedent in any other court than the common pleas, such person shall pay all costs of such suit, including a

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docket fee of three dollars, without reference to the result of the suit: *Provided*, the said common pleas judge is disinterested in all matters in relation to the suit last above provided for.

Fees, how collected and disposed of.

SEC. 37. The docket fees in the last section specified shall be collected by the sheriff as other costs are collected, and shall be paid over to the county treasurer of the proper county out of the first moneys that may come into his hands in that behalf.

Salary of judge.

SEC. 38. The salary of the judges of common pleas shall be graduated as follows, viz: in districts in which the population is under five thousand, the annual salary of the judge shall be three hundred dollars; in districts in which the population is over five thousand, and under eight thousand the salary shall be four hundred dollars; in districts in which the population is over eight thousand and under thirteen thousand, the salary shall be five hundred dollars; in districts in which the population is over thirteen thousand and under eighteen thousand, the salary shall be six hundred dollars; and in all districts where the population is over eighteen thousand, the salary shall be eight hundred dollars; *Provided*, that in all districts composed of only one or two counties, the salary of said judge shall not exceed six hundred dollars per annum. *And provided further*, that in districts of more than two counties said salary shall not exceed six hundred dollars, unless the population of such district shall exceed thirty thousand.

The census to be the basis of enumeration.

SEC. 39. The last census or enumeration made by the United States or this State, from time to time, shall be taken as the basis of population upon which to graduate the salaries as aforesaid. Said salary shall be payable quarterly out of the county treasury; and when two or more counties form a district, each county shall pay its proportion on the basis of population aforesaid.

When judge may practice law.

SEC. 40. The judge of such court of common pleas may practice law in any other court besides his own in any matter which has not been adjudicated upon in his court.

Not to give advice or prepar any paper.

SEC. 41. Such judge of common pleas is hereby prohibited from giving any legal advice or preparing any paper or writing in relation to any suit pending in the court of which he is such judge.

Order of business.

SEC. 42. The business before said court shall be docketed and disposed of in the following order, to-wit:

First. The criminal business;

Second. The business connected with the administration and settlement of estates, and the probate of wills and guardianship;

Third. Other business in said court.

Repeal.

SEC. 43. All laws and parts of laws contravening the provisions of this act, are hereby repealed from and after the first day of October, one thousand eight hundred and fifty-two.

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Petit jurors—how selected—how summoned.

CHAPTER 9.

AN ACT prescribing the manner of impanneling Petit Jurors, the number and compensation thereof.

[APPROVED MAY 20, 1852.]

Manner of selecting jurors, and by what officers.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. On the sixth Monday before the commencement of any term of the circuit court of any county, the treasurer, auditor, and recorder of such county shall write on separate slips of paper the names of one hundred reputable male householders, competent to serve as jurors, distributed as nearly as may be, among the townships of such county, in proportion to their population, and deposit such slips in a box to be provided for that purpose, when the clerk of the circuit court shall draw from such box twelve of such names, and in case any of such officers are interested in any suit pending in such court, he shall not act in the selection of such jury, but the same shall be done by such remaining officers aforesaid as are not thus interested; and, if any one thereof, being thus interested, shall participate in the selection of such jury, or if all such officers are so interested, such court, upon proof thereof, on the first day of the term of such court thereafter, shall discharge such panel, and direct the summoning of a jury from other competent citizens; and if any two or more of such offices are filled by the same person, he shall discharge the duties pertaining to each of such offices, as herein provided.*

Summons, and filling the panel.

SEC. 2. Such clerk shall immediately thereafter issue process directing the sheriff of the county to summon the persons whose names are drawn to appear at the next term thereafter of the circuit court of the county, on the first day thereof, to serve as petit jurors, at which time such court shall cause the list of such jurors to be called by the sheriff, when if twelve thereof do not appear, the court shall cause the sheriff to summon other reputable householders of the county to supply the deficiency; and should the panel not be full at any time on the calling of a cause to be submitted to a jury, the court shall direct it to be filled from other competent citizens of the county: *Provided*, that in no case shall such sheriff summon or select any person who has a cause pending in such court for trial at that term, except he be of such regular panel.

When court may discharge jury.

SEC. 3. Such court at any time after the expiration of three days from the commencement of the term, may discharge such

*See post, part II, chap. 1, title "trial by jury," R. S., vol. II, where the decisions of the supreme court, touching juries, are collected.

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jury, when their services are not required; and, after such discharge, at the same term, should a jury be demanded, the court shall direct the sheriff to summon one from other competent citizens of the county.

Compensation.

SEC. 4. Such jurors shall be entitled to one dollar and twenty-five cents per each day for their services, counting, in case of the regular panel, from the commencement of the term, to the time of their discharge, and in case of those casually summoned only the time they shall actually serve, such compensation to be paid out of the county treasury upon the order of such court.

Jury fee.

SEC. 5. In every case tried by a jury, in the circuit or common pleas court, in any county, the clerk of such court, as a part of the cost of proceeding, shall tax a jury fee of four dollars and fifty cents against the losing party.

Challenge.

SEC. 6. No challenge to the array shall be permitted because of any informality in the impanneling or selecting of such jury.

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PART SECOND.

CONCERNING THE CIVIL PROCEDURE OF COURTS, AND THEIR JURISDICTION IN CIVIL MATTERS.

CHAPTER 1.

AN ACT to revise, simplify and abridge the Rules, Practice, Pleadings and Forms in Civil Cases in the Courts of this State—to abolish distinct forms of action at law, and to provide for the administration of justice in a uniform mode of pleading and practice, without distinction between law and equity.

[APPROVED JUNE 18, 1852.]

ARTICLE I.

Distinction between law and equity abolished.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing are abolished, and there shall be in this State, hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action.

Plaintiff and defendant.

SEC. 2. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

ARTICLE II.

Parties to Actions.

Name of the real party to be used.

SEC. 3. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in the next section; but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract. *

An executor, trustee, &c., how to sue.

SEC. 4. An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, shall be construed to include a person with whom, or in whose name, a contract is made for the benefit of another. It shall not be

* See Wick & Barbour's Treatise, p. 77 to 89, for a condensed statement of authorities in point.

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necessary to make an idiot or lunatic a joint party with his guardian or committee, except as may be required by statute.

Actions that survive.

SEC. 5. In all cases where actions survive, they may be commenced by or against the representatives of the deceased to whom the interest in the subject matter of the action has passed.

By assignees.

SEC. 6. When any action is brought by the assignee of a claim arising out of contract, and not assigned by endorsement in writing, the assignor shall be made a defendant, to answer as to the assignment, or his interest in the subject of the action. And all actions by assignees shall be without prejudice to any set-off or other defense existing at the time of, or before notice of the assignment, except actions on negotiable promissory notes and bills of exchange, transferred in good faith and upon good consideration before due.*

Upon official bonds.

SEC. 7. Actions upon official bonds, and bonds payable to the State, shall be brought in the name of the State of Indiana, upon the relation of the party interested.

Married women

SEC. 8. When a married woman is a party, her husband must be joined with her; except:

First. When the action concerns her separate property, she may sue alone.

Second. When the action is between herself and her husband, she may sue or be sued alone; but in no case shall

* No formality is necessary to effect the assignment of a chose in action; any transaction between the parties which indicates their intention to pass the beneficial interest, in the instrument from one to another, is sufficient for that purpose; a debt may be assigned in equity, by parol, as well as by writing. When a debt secured by mortgage is so assigned, and the mortgage-deed delivered to the assignee, he becomes invested with all the equitable rights of the mortgagee.—4 Blackf. 380; 2 Story's Equity 311; 1 Blackf. 137.

The mere delivery of a bond, covenant, note, account, or other claim, for a valuable consideration, is a valid assignment, if such delivery was intended by the parties as a transfer.—17 Johns. 284; 13 Mass. Rep. 304. So a delivery of a note to receive its amount and apply to a debt, is an assignment of it.—1 Caine's Rep. 363.

Special notice is not necessary under this section; it is enough if the debtor has such a knowledge of facts and circumstances, as is sufficient to put him on inquiry, especially if a debtor make a payment, or any other arrangement to defraud the holder of the claim; and a claim by way of set off, or any other defence, as against the assignor, arising after assignment and notice, without the consent of the assignee, will not be allowed.—12 Johns. 343; 1 B. & P. 447.

The assignee will be protected against the acts and declarations of the assignor, subsequent to the assignment, and such declarations cannot be given in evidence against the assignee.—10 Wend. 675.

When the debtor having notice of the intended assignment, previous thereto, makes no objection, he will be considered as consenting to the assignment, and as waiving his right to any set off or defence as against the assignor, in an action brought against him for the benefit of the assignee.—16 Mass. R., 397.

If the instrument sought to be sued on is assignable under the statute, and has been assigned, the assignee should sue, and not the assignor for the use of the assignee.—*Mountjoy* vs. *Adair*, 1 Carter's Ind. Rep. 254.

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Husband and wife—Infants—guardian *ad litem*.

she be required to sue or defend by guardian or next friend, except she be under the age of twenty-one years.*

Husband and wife.

SEC. 9. If a husband and wife are sued together, and the action relates to her separate property, the wife may defend in her own right; and, if the husband neglect to defend, she may defend in his right also.

Infants.

SEC. 10. When an infant shall have a right of action, such infant shall be entitled to maintain suit thereon, and the same shall not be delayed or deferred on account of such infant not being of full age.

Next friend.

SEC. 11. Before any process shall be issued in the name of an infant, who is a sole plaintiff, a competent and responsible person shall consent in writing to appear, as the next friend of such infant, and such next friend shall be responsible for the costs of such action, and thereupon process shall issue as in other cases; but where it shall appear to the court that such next friend is incompetent, or irresponsible, the court may remove him, and permit some suitable person to be substituted, without prejudice to the progress of the action.†

Written consent.

SEC. 12. The court in its discretion may require the next friend of an infant, in an action for the recovery of any debt or damages, to execute a written undertaking to such infant, with sufficient sureties, to be approved by the court, that the next friend shall duly account to the infant for all moneys which may be recovered in such action.

Guardian ad litem.

SEC. 13. An infant defendant shall appear and defend, by guardian appointed by the court, or chosen by such infant with the consent of the court.‡

* The wife may sue when the husband is *dead in law*. When the husband has been abroad, and not heard from for seven years, he is presumed to be dead.—Bac. Abr. & Feme M.

When the injury is committed to the person of the wife during coverture, her husband must join; and if she die, the suit abates; but if the husband die, it survives to the widow.—18 Johns. 443.

† The plaintiff's *prochein amy* having been discharged as such, pending the suit, may be a witness for the plaintiff.—*Harvey* vs. *Coffin*, 5 Blackf. 566.

‡ The answer of a complainant, to the cross-bill of adult defendants, stating the consideration of a note, cannot be taken as proof against the infant defendants.—*Campbell et al.* vs. *Campbel*, 1 Carter's Ind. Rep. 220.

A decree against infants, without proof, is erroneous, notwithstanding the admission of a *guardian ad litem* as to the truth of the allegations of the bill.—*Crain et al.* vs. *Parker*, 1 Carter's Ind. Rep. 374.

When the record simply recites that "on motion," without specifying on whose motion, a *guardian ad litem* was appointed, this court will presume the minors were personally in court.—*Horner et al.* vs. *Doe d. State Bank*, 1 Carter's Ind. Rep. 130.

In proceedings against a lunatic and a minor, to foreclose a mortgage, it is necessary that proof is made of the exhibits, and that the record show that such proof is made.—*Ward et al.* vs. *Kelly*, 1 Carter's Ind. Rep. 101.

An insane person cannot sue by a solicitor.—*Jelly, adm'r.* vs. *Elliott*, 1 Carter's Ind. Rep. 119.

Certain persons claiming to be creditors of A., filed a bill in chancery against

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Guardian not liable for costs.

SEC. 14. No person appointed as guardian shall be liable for the costs of the action, unless charged by the special order of the court for some personal misconduct in the same.

In case of a poor person.

SEC. 15. Any poor person, not having sufficient means to prosecute or defend an action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend, as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defence, who shall do their duty therein without taking any fee or reward therefor from such poor person.

May be deprived of the benefit.

SEC. 16. If the person so admitted be guilty of any improper conduct, or of any unjustifiable delay in the progress of such action, the court may, in its discretion, annul such order, and he shall thereafter be deprived of all benefit of the order admitting him to prosecute or defend as such poor person.

Who plaintiffs.

SEC. 17. All persons having an interest in the subject of the action, and in obtaining the relief demanded, shall be joined as plaintiffs, except as otherwise provided in this chapter [article.]*

him and his infant children, to subject certain land to the payment of the complainant's claims, which land, it was alleged, the father had caused to be conveyed to his children to defraud his creditors. Some of the complainants were judgment-creditors; the others were not. The father answered and confessed the bill. The infants answered by their *guardian ad litem* in the usual form. *Held*, that a decree for the complainants, on no other evidence than the father's answer, was erroneous. *Held*, also, that those complainants who were not judgment-creditors, should not have been parties to the suit.—*Shirley et al.* vs. *Shields et al.*, 8 Blackf. 273.

The assignee of a judgment for a certain sum of money, filed a bill in chancery against the infant heirs of the judgment-debtor. The bill alleged that the judgment-debtor died insolvent, leaving certain land on which the judgment was a lien, and prayed that the land might be sold for payment of the judgment. *Held*, that the defendants being infants, there could not be a final decree against them without proof; that if there was no administrator of the estate, the bill should have alleged that fact; and if there was an administrator, he should have been a party; that the assignor of the judgment might have been made a party; but *quære*, whether he was a necessary party.—*Bryer et al.* vs. *Chase*, 8 Blackf. 508.

A decree in chancery cannot be rendered against an infant defendant without proof, though the answer, filed by his *guardian ad litem*, admit the bill to be true. —*Hough et al.* vs. *Doyle*, 8 Blackf. 301.

* When there are several plaintiffs, the declaration must show a *prima facie* title in them all to sue. *Strange et al.* vs. *Lowe et al.*, 8 Blackf. 243.

In a suit on a written promise made to the plaintiff in a wrong name, the declaration should aver that the promise was made him by the wrong name.—*Williams* vs. *Dickerson*, 8 Blackf. 287.

If a deed be made between A. of the one part and B. of the other and be so expressed on its face, a third person cannot sue on it, though it contain an express covenant for the performance of acts for such third person's benefit.—*Haskett* vs. *Flint*, 5 Blackf. 69.

A writ was issued by a justice of the peace in the name of J. & R. M. Secrest, plaintiffs. *Held*, that a motion of the defendant to dismiss the suit, made before his appearance and plea to it, should be sustained.—*Secrest et al.* vs. *Arnett*, 5 Blackf. 366.

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Parties to action--who defendants—several parties.

SEC. 18. Any person may be made a defendant who has, or claims, an interest in the controversy, adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the questions involved.* Who defendants

SEC. 19. Of the parties in the action, those who are united in interest must be joined as plaintiffs or defendants; but, if the When there are several parties.

A note was given to a private association, for a debt due them, as follows: "I acknowledge myself indebted to the trustees of the Springborough School Society in the sum of 28 dollars and 89 cents, which I promise to pay unto A. B., treasurer of said society," &c. *Held*, that a suit would not lie, on this note, in the name of the treasurer.—*Morrow* vs. *Leaman*, 3 Blackf. 338.

If a bond, payable "to the trustees or their successors in office, be the property of a congressional township, the suit on it must be in the corporate name of the township.—*Johnson et al.* vs. *Harris et al.*, 3 Blackf. 387.

The defendant had signed a subscription paper, promising to pay a certain sum of money towards defraying the expenses of erecting the public buildings at Connersville, provided a new county should be established, and Connersville be made the seat of justice—the money to be paid into the hands of any person whom the board of commissioners of the new county should authorize to receive it. *Held*, that the county agent, having no legal or beneficial interest in the contract, could not sue upon it in his own name.—*Harper* vs. *Ragan*, 2 Blackf. 39.

If the agent had been specially appointed by the commissioners to receive the money, which was to be paid to any person thus appointed, that circumstance would not have authorized a suit in his own name.—*Ibid.*

Semble, that if one person promise another for the benefit of a third, the third person may sue.—*Ibid.*

The action against a carrier for loss of goods, sent by the vendor to the vendee, must in general be brought in the name of the latter, and not in the name of the consignor, because the bond implies that by the delivery to the carrier the goods became the property of the consignee, and at his risk, subject of course, to the unpaid vendor's right of stoppage *in transitu*. When the consignee has assigned his interest in goods before consignment, or loss of the goods, his assignee ought to bring the action.—4 Blackf. 364; 8 T. R. 330.

All the members of a firm should sue: No private arrangement that one partner alone should sue, will be valid.—2 Tyr. 140. The case of *dormant* partner is an exception to this rule.—4 B. & C. 664.

Joint-tenants must sue jointly upon a contract relating to the joint estate. Tenants in common should sue jointly for rent of premises jointly demised.—1 Chitty's Pl. 13.

If, however, the rent be reserved separately, in distinct parts, they must sue separately.—*Ibid.*

If there be several executors or administrators they ought all to join as plaintiffs; but if one of the executors has refused to accept the trust, it does not seem necessary to join him as plaintiff.—1 Saund. 291.

See also, 1 Saund. Pl. & Ev. 250, as to suit by assignee in bankruptcy, and for the probable rule in case of an application for a discharge under the insolvent act.

* If a person, not made a party to a bill, appear and answer, he cannot assign for error that he was not made defendant.—*Moyer* vs. *McCullough*, 1 Carter's Ind. Rep. 339.

A decree in chancery against persons not parties to the suit is void as to them.—*Shaw et al.* vs. *Hoadley*, 8 Blackf. 165.

If a person execute a written promise by a wrong name, he must be sued on the instrument in that name.—*Wooster* vs. *Lyons*, 5 Blackf. 60.

An unincorporated company cannot be sued in the name of the firm.—*Holland et al.* vs. *Butler*, 5 Blackf. 255.

Also, see *Hays et al.* vs. *Lanier et al.*, 3 Blackf. 322.

If one of two joint debtors die, the survivor may be sued for the debt; and if the survivor be insolvent, the estate of the deceased debtor is chargeable for the debt in equity.—*Brown* vs. *Benight et ux.*, 3 Blackf. 39.

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consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint; and when the question is one of a common or general interest of many persons, or where the parties are numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

Persons liable upon the same obligation.

SEC. 20. Persons severally and immediately liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff.

Action not to abate, when.

SEC. 21. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage or other disability of a party, the court, on motion, or supplemental complaint, at any time within one year, or on supplemental complaint afterwards, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or, the court may allow the person to whom the transfer is made to be substituted in the action.

Court may determine as to the parties before it.

SEC. 22. The court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had, without the presence of other parties, the court must cause them to be joined as proper parties. And when, in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be made a party, by the proper amendment.

When a nominal defendant may have the real one substituted.

SEC. 23. A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person, and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

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Seduction—when father, wife or guardian may prosecute.

Unmarried female; seduction.

SEC. 24. Any unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor.*

When the father and guardian may prosecute.

SEC. 25. A father, or in case of his death or desertion of his family, or imprisonment, the mother, may prosecute as plaintiff for the seduction of the daughter; and the guardian, for the seduction of the ward, though the daughter or ward be not living with, or in the service of, the plaintiff, at the time of the seduction or afterwards, and there be no loss of service. When the action is brought by the guardian, the damages recovered shall inure to the ward.†

When the wife or mother may prosecute.

SEC. 26. When a husband or father has deserted his family, or is imprisoned, the wife or mother may prosecute or defend, in his name, any action which he might have prosecuted or defended, and shall have the same powers and rights therein as he might have had.

Injury to child or ward.

SEC. 27. A father, or in case of his death or desertion of his family, or imprisonment, the mother, may maintain an action for the injury or death of a child; and a guardian, for the injury or death of his ward. But when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of the ward.

ARTICLE III.

Actions—Where commenced.

Actions, where commenced.

SEC. 28. Actions for the following causes must be commenced in the county in which the subject of the action, or some part thereof, is situated:

First. For the recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

Second. For the partition of real property.

Third. For the foreclosure of a mortgage of real property.

* The seduction of an innocent woman by a pretended marriage, the seducer having a wife living, entitles the injured party to a compensation in money, and is deemed in law a valuable consideration for a grant.—*Doe* vs. *Horn*, 1 Carter's Ind. Rep. 363.

† A father can maintain a suit for the seduction of his daughter unmarried under twenty-one years of age, though, previously to the seduction, she had left her father's house with his consent without intending to return, and with his license to appropriate her time and services to her own use.—*Boyd* vs. *Byrd*, 8 Blackf. 113.

Case by a father for debauching his daughter, whereby she became pregnant, &c. Plea, not guilty. The following instructions to the jury asked for by the defendant, were refused: 1, criminal connection may take place between the parties without seduction: 2, if seduction was not proved, damages for it should not have been given. *Held*, that the instructions should have been given to the jury.—*Hill* vs. *Wilson*, 8 Blackf. 123.

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Same subject.

SEC. 29. Actions for the following causes must be commenced in the county where the cause, or some part thereof arose:

First. For the recovery of a penalty, or forfeiture imposed by statute, except, when imposed for an offense committed on a lake or river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed.

Second. Against a public officer, or person specially appointed to execute his duties, for an act done by him in virtue of his office; or against a person who, by his command, or in his aid, shall do anything touching the duties of such officer. In all cases enumerated in this and the section immediately preceding it, process may issue to and be served in any county in the State.

Action may be brought where agent resides.

SEC. 30. When a corporation, company, or an individual, has an office or agency in any county for the transaction of business, any action growing out of or connected with the business of such office, may be brought in the county where the office or agency is located, at the option of the plaintiff, as though the principal resided therein, and service upon any agent or clerk employed in the office or agency, shall be sufficient service upon the principal; or process may be sent to any county and served upon the principal.

Wills.

SEC. 31. An action to establish or set aside a will, must be brought in the county in which the will, if valid, ought, according to law, to be proved and recorded.*

Railroads, canals, &c.

SEC. 32. An action against a railroad or canal corporation, or company, or owner of a line of stages or coaches, for an injury to person or property upon the railroad, canal, or line of stages or coaches of the defendant, or upon a liability as a carrier, may be brought in any county through or into which such railroad, canal, or line of stages or coaches passes; and the summons may be served in any county in the State.†

When the defendants reside in several counties.

SEC. 33. In all other cases the action shall be commenced in the county where the defendants, or one of them, has his usual place of residence. When there are several defendants, residing in different counties, the action may be brought in any county where either defendant resides, and a separate summons may be issued to any other county where the other defendants may be found; and in cases of non-residents, or persons having no permanent residence in the State, action may be commenced and process served in any county where they may be found.

* See title "Wills," R. S. Vol. 2.

† See title, "Railroads, destruction of live animals, &c." R. S. vol. 1, page 426.

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Service of summons—on corporation—in real actions.

ARTICLE IV.

Commencement of actions and service of summons.

Commencem't of action—summons.

SEC. 34. A civil action shall be commenced by filing in the office of the clerk a complaint, and causing a summons to issue thereon; and the action shall be deemed to be commenced from the time of issuing the summons; but, as to those against whom publication is made, from the time of the first publication. The summons shall be issued by the clerk, under the seal of the court, and directed to the sheriff, and shall notify the defendant of the action commenced, the parties thereto, and the court where pending.

Service of summons.

SEC. 35. The summons shall be served, either personally on the defendant, or by leaving a copy thereof at his usual or last place of residence. An acknowledgment on the back of the process, or the voluntary appearance of a defendant, is equivalent to service.

Service on a corporation.

SEC. 36. The process against a corporation may be served on the president, presiding officer, mayor, chairman of the board of trustees, or if its chief officer is not found in the county, then upon its cashier, treasurer, secretary, clerk, general or special agent, or, if it is a municipal corporation, upon its marshal, or, if it is an incorporated library company, upon its librarian; if none of the officers aforesaid can be found, then upon any person authorized to transact business in the name of such corporation.

Summons not to be set aside, when.

SEC. 37. No summons, or the service thereof, shall be set aside, or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an action instituted against him in court.

Notice to a defendant in a real action.

SEC. 38. Where it appears, by affidavit filed, that a cause of action exists against any defendant, or that he is a necessary party to an action, in relation to real estate, the clerk, by order of the court, if in session, or in vacation without such order, shall cause a notice of the pendency of such action, and the term at which the same will stand for trial, to be published for three weeks successively, in some newspaper of general circulation printed in the county, or if none be printed therein, then in the county in this State nearest thereto in which any such newspaper is printed, in either of the following cases, shown by affidavit:

First. Where the defendant is a foreign corporation, and has property within the State, or the cause of action arose therein.

Second. Where the defendant, being a resident of this State, has departed therefrom, with intent to defraud his

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creditors, or to avoid the service of the summons, or keeps himself concealed therein, with a like intent.

Third. In all cases where the defendant is not a resident of this State, and the cause of action is founded upon or connected with a contract, or arises from a duty imposed by law, or the object of the action is to enforce or discharge a lien, or to obtain a divorce.

Personal service of a summons out of the State sufficient.

SEC. 39. When the defendant is a non-resident, personal service of the summons out of the State is equivalent to publication, and such service may be proved by the affidavit of a competent person, made before any officer authorized to administer oaths; which affidavit shall state the time and place, and mode of giving the notice, and set forth that the person thus served with notice is the identical person named in the action or proceeding; or the identity of the person served may be proved by the affidavit of the plaintiff, or any other person.

Unknown defendants.

SEC. 40. In cases where it shall be necessary to make any persons defendants to any action, and the names of all or any of them shall be unknown to the plaintiff, and he shall annex to his complaint an affidavit of his want of knowledge of their names, and that their residence is, as he verily believes, not in this State, proceedings may be had against them without naming them: and the court shall make such order respecting notice, and the publication thereof, as may be deemed proper.

When the summons is served on some, but not on all the defendants.

SEC. 41. Where the action is against two or more defendants, and the summons is served on one or more, but not all of them, the plaintiff may proceed as follows:

First. If the action be against defendants jointly indebted on contract, he may proceed against the defendant served, and if he recover judgment, it may be enforced against the joint property of all, and the separate property of the defendant served; or,

Second. If the action be against defendants severally liable, he may proceed against the defendants served in the same manner as if they were the only defendants, and may afterwards proceed against those not served.

Third. If all the defendants have been served, judgment may be taken against any or either of them severally when the plaintiff would be entitled to judgment against such defendant or defendants, if the action had been against them or any of them alone.

Return of "not found."

SEC. 42. When there is a return of "not found" as to any of the defendants, such return shall be suggested on the record, and the plaintiff may continue the cause as to them for another summons at his option; and he may, in either

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case, proceed immediately against the defendants served in time.

Opening of the judg't in 5 y'rs.

SEC. 43. Parties against whom a judgment has been rendered without other notice than the publication in the newspaper herein required, except in cases of divorce, may at any time within five years after the rendition of the judgment, have the same opened, and be allowed to defend.

Notice thereof.

SEC. 44. But before any judgment shall be opened, such party shall give notice to the original complainant, or his heirs, devisees, executors or administrators, of his intention to make application to have the judgment opened as the court, in term, or the judge thereof, in vacation, shall require; and shall file a full answer to the original complaint, and an affidavit stating that during the pendency of the action, he received no actual notice thereof in time to appear in court and object to the judgment, and shall also pay all such costs of the action as the court shall direct.

Bona fide purchaser not to be affected.

SEC. 45. If any property, which was the subject of, or properly sold under any judgment sought to be opened as provided in the last two preceding sections, shall have passed into the hands of a purchaser in good faith, he shall not be affected by any proceedings consequent upon the opening of the judgment.

ARTICLE V.

Pleadings.

Pleadings defined.

SEC. 46. The pleadings are formal allegations by the parties of their respective claims and defenses for the judgment of the court.

Distinct forms abolished.

SEC. 47. All the distinct forms of pleading heretofore existing, inconsistent with the provisions of this act, are hereby abolished; and hereafter the forms of pleadings in civil actions, in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are modified as prescribed by this act.

What pleadings allowed.

SEC. 48. The only pleadings allowed are,

First. The complaint by the plaintiff;

Second. The demurrer and answer by the defendant;

Third. The demurrer and reply, by the plaintiff.

Complaint.

What the complaint shall contain.

SEC. 49. The first pleading on the part of the plaintiff, is the complaint. The complaint shall contain,

First. The title of the cause, specifying the name of the court and county, in which the action is brought, and the

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names of the parties to the action, plaintiff and defendant.

Second. A statement of the facts constituting the cause of action, in plain and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.

Third. Where the complaint contains more than one cause of action, each shall be distinctly stated in a separate paragraph and numbered.

Fourth. A demand of the relief to which the plaintiff may suppose himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

Demurrer.

For what causes complaint may be demurred to.

SEC. 50. The defendant may demur to the complaint when it appears upon the face thereof, either,

First. That the court has no jurisdiction of the person of the defendant, or the subject of the action; or,

Second. That the plaintiff has not legal capacity to sue; or,

Third. That there is another action pending between the same parties for the same cause; or,

Fourth. That there is a defect of parties, plaintiff or defendant; or,

Fifth. That the complaint does not state facts sufficient to constitute a cause of action; or,

Sixth. That several causes of action have been improperly united;

And for no other cause shall a demurrer be sustained; and, unless the demurrer shall distinctly specify and number the grounds of objection to the complaint, it shall be overruled.

Misjoinder.

SEC. 51. Where a demurrer is sustained on the ground of several causes of action being improperly united in the same complaint, the court shall order the misjoinder to be noted on the order book, and cause as many separate actions to be docketed between the parties as there are causes decided by the court to be improperly joined; and each shall stand as a separate action, and the plaintiff shall thereupon file a complaint in each of the above cases, to which the defendant shall enter his appearance, and plead and go to trial, or suffer a default, in the same manner as in the original action.

Same.

SEC. 52. No judgment shall ever be reversed for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action.

SEC. 53. If the court sustain a demurrer, the plaintiff may amend by the payment of the costs occasioned thereby.

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Demurrer, continued—answer—counter-claim—set-off.

For other causes defendant may object in his answer.

SEC. 54. When any of the matters enumerated in section fifty do not appear upon the face of the complaint, the objection (except for misjoinder of causes,) may be taken by answer. If no such objection is taken, either by demurrer, or answer, the defendant shall be deemed to have waived the same, except only the objection to the jurisdiction of the court over the subject of the action.

Demurrer to one and answer to others.

SEC. 55. The defendant may demur to one or more of the several causes of action alleged in the complaint, and answer as to the residue.

Answer.

What the answer shall contain

SEC. 56. The answer shall contain,

First. A denial of each allegation of the complaint controverted by the defendant, or of any knowledge or information thereof, sufficient to form a belief.

Second. A statement of any new matter constituting a defense, counter-claim, or set-off, in plain and concise language, without repetition.

Third. The defendant may set forth in his answer as many grounds of defense, counter-claim, and set-off, whether legal or equitable, as he shall have. Each shall be distinctly stated in a separate paragraph, and numbered, and clearly refer to the cause of action intended to be answered.

Set-off.

SEC. 57. The set-off shall be allowed only in actions for money demands upon contract, and must consist of matter arising out of a debt, duty, or contract, liquidated or not, held by the defendant at the time the suit was commenced, and matured, at or before the time it is offered as a set-off. *

* An unliquidated demand for damages, is not a proper subject of set-off in an action at law.—*Smith* vs. *Smith*, 1 Carter's Ind. Rep. 476.

In debt against A. & B. the process was returned served on the former, and not found as to the latter. *Held*, that in such case, a plea of set-off by A., or of a debt due to him alone, or a debt due to B. alone, from the plaintiff, is bad on demurrer; but it is not a nullity, nor is it so objectionable that it will be set aside on motion.—*Carter* vs. *Berkshire*, 8 Blackf 193.

If B., a member of a firm, deal in his own name, in business of the firm with A. who is ignorant of the partnership, the latter may be sued for a demand against him, arising from such dealings, either by B. alone, or by the firm. And in a suit by the firm for such demand, A.'s right of set-off is the same as if B. had sued alone.—*Ward et al.* vs. *Leviston*, 7 Blackf. 466.

The vendor of a lot tendered a good conveyance to the vendee, if he would pay the purchase money, or allow the same on a note held by him on the vendor. The tender was refused. *Held*, in a suit on the note by the assignee of the vendee (the assignment having been made after the tender,) that said purchase money was a legal matter of set-off.—*Hart et al.* vs. *Woods*, 7 Blackf. 568.

Assumpsit. The issues were whether a note, pleaded as a set-off, had been discharged by an accord and satisfaction, or in any other manner. The court instructed the jury that if the note was, for value, surrendered to the plaintiff with a promise by him to account for the proceeds of it, the promise to account was the only proper subject of set-off in the cause. *Held*, that the instruction was erroneous.—*Fellows et al.* vs. *Kress*, 7 Blackf. 59.

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Set-off, continued--what may be pleaded by one of several defendants.

What may be pleaded as a set-off by one of several def'ts.

SEC. 58. In all actions upon a note or other contract against several defendants, any one of whom is principal and the others sureties therein, any claim upon contract in favor of the principal defendant, and against the plaintiff, or any for-

Assumpsit for goods sold and delivered, &c. Plea of payment, alleging that the plaintiff was indebted to the defendant in a certain sum for money had and received, &c. Replication in denial of the plea. *Held*, that a promissory note given by the plaintiff to a third person, and indorsed to the defendant before the suit was commenced, might be read in evidence by the defendant under the plea. —*Usher* vs. *Stewart*, 7 Blackf. 310.

A defendant in assumpsit, who pleads the general issue with notice of set-off, and furnishes a bill of particulars of the matters of set-off, is confined in his proof to the bill of particulars.—*Harding* vs. *Griffin*, 7 Blackf. 462.

Under a general charge, in such bill, of cash to a certain amount, the defendant will not be permitted to prove that, in the capacity of executor, he had overpaid the plaintiff a legacy left him by the defendant's testator.—*Ibid.*

If the surety for a debt pay the same before it is due, the payment will, after the debt has become due, but not before, be a legal set-off against his note payable to the principal and held by him.—*Jackson* vs. *Adamson*, 7 Blackf. 597.

Such payment is also a good set-off against the said note in the hands of an assignee, if notice of the assignment had not been given to the maker before the payment became a valid demand against the payee.—*Ibid.*

Assumpsit on a promissory note and for goods sold and delivered. Plea, that as to 166 dollars and 14 cents, part, &c., the defendant, before the commencement of the suit, &c., paid that sum to the plaintiff in the manner following, viz: that the plaintiff was then and there and still is indebted to the defendant in the said sum, for goods, &c., before that time sold and delivered by the defendant to the plaintiff at his request, and for money paid, &c.; concluding with an offer to set off, &c. *Held*, that the plea was good.—*Woodruff* vs. *Clark*, 6 Blackf. 337.

The defendant in such suit cannot plead as a set-off, nor give in evidence under the general issue, a decree in chancery in his favor against the plaintiff, though for a certain sum of money, if rendered in this State.—*Ibid.*

Assumpsit commenced before a justice of the peace by *Rogers* against *White*. Plea, payment and set-off. The matter of set-off was a joint and several promissory note for 51 dollars, signed *Simmers* and *Rogers*, payable to one *Richards*, and assigned by him to the defendant before the commencement of the suit. *Held*, that the set-off was admissible. *Held*, also, that the plaintiff's execution of the note could be denied only under oath.—*White* vs. *Rogers*, 6 Blackf. 436.

A debt due by A. and B. to C. cannot be set off, either at law or equity, against a debt due by C. to A. alone. *Etter* vs. *Laswell*, 2 Blackf. 349. See also, *Wasson* vs. *Gould*, 3 Blackf. 18.—*M'Kinney* vs. *Bellows*, 3 Blackf. 31.

In suit against A. on a joint and several note of A. and B., the defendant cannot set off a debt due by the plaintiff to B. And, even if the suit should be against A. and B. on the note, a debt due by the plaintiff to B. would not for the want of mutuality, be a legal matter of set-off.—*Jennings* vs. *Shriver*, 5 Blackf. 37.

The defendant in a suit against him for his separate debt, cannot set off a debt due to him and another.—*Richardson* vs. *The St. Joseph Iron Company*, 5 Blackf. 146.

In a suit by the assignee of the payee of a promissory note against the maker, a note executed by the assignor and a third person, though obtained by the defendant before notice of the assignment, is not a matter of set-off if such third person be alive: *sliter*, if he be dead.—*Wells* vs. *Teall*, 5 Blackf. 306.

A plea to such suit, that before the commencement of the suit, and before notice of the assignment, the defendant paid to the assignor the amount of the note, by the sale and delivery to him of a large quantity of stage stock of the value, &c., is sufficient.—*Ibid.*

Distinct matters in a plea of set-off are like several counts in a declaration, and, if some of the items of set-off be sufficient and others not, the plaintiff may reply to one part of the plea and demur to another; but a demurrer to the whole plea would be bad.—*Shearman* vs. *Fellows et al.*, 5 Blackf. 459.

A plea setting out, as matter of set-off, the plaintiff's written acknowledgment of having received from the defendant an order on a lawyer for the proceeds

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mer holder of the note or other contract, may be pleaded as a set-off by the principal or any other defendant.

Counter-claim.

SEC. 59. A counter-claim is any matter arising out of, or connected with the cause of action, which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages.

Deft. omitting to set up counter-claim, &c.

SEC. 60. If any defendant, personally served with notice, omit to set up a counter-claim arising out of the contract or transaction set forth in the complaint as the ground of the plaintiff's claims, or any of them, he cannot afterwards maintain an action against the plaintiff therefor, except at his own costs.

Cross demands.

SEC. 61. When cross demands have existed between persons, under such circumstances that one could be pleaded as a counter-claim or set-off to an action brought upon the other, neither can be deprived of the benefit thereof by the assignment or death of the other, and the two demands must be deemed compensated, so far as they equal each other.

Several defendants.

SEC. 62. Several defendants may answer jointly or severally, as the facts set forth in the complaint may require.

New party.

SEC. 63. When it is necessary for the defendant to bring a new party before the court, he may state the matter relating

of a claim of the defendant in a suit, &c., does not show a subsisting debt due from the plaintiff to the defendant, and is therefore insufficient.—*Ibid.*

If there be issues on two replications to a plea of payment and set-off, and one of the issues be found for the plaintiff, the set-off is defeated.—*Stipp* vs. *The Washington Hall Company*, 5 Blackf. 473.

A defendant may waive the right of set-off given him by statute, and bring a cross action for his demand.—*Judah* vs. *Brandon*, 5 Blackf. 506.

In a suit on a promissory note by the assigees of the payee against the makers, it was held that a debt due from the payee to one of the defendants, or from the payee and another person to the defendants, before the assignment, was not a good matter of set off.—*Woods et al.* vs. *Harris*, 5 Blackf. 525.

In suit either at law or in equity against two partners, the individual demand of one of the defendants against the plaintiff, is not a proper subject of set-off.—*Wasson* vs. *Gould et al.* 3 Blackf. 18.

The law of set-off applies only to debts which are liquidated and due in the same right.—*M'Kinney* vs. *Bellows*, 3 Blackf. 31.

In an action brought by A. against C., for a debt due A. by C., the defendant cannot set off a debt due to him by D. and B; and the circumstance that A. and B. are non-residents, and have no property within the State, makes no difference. *Ibid.*

A., assignee of B., sued C. on a promissory note, given by the defendant to B. for 197 dollars and 79 cents. Plea of payment to B. with notice of set-off. The plea shows that, at the date of the note, B. owed C. more than the amount of the note. Replication, that B. was indebted to A. in the sum of 500 dollars, and had a quantity of furs worth 800 dollars, a part of which, to the value of 300 dollars, he was about to sell to A in a part payment of the debt due him;—that B. and C. then agreed, with A.'s consent, that C. should buy the whole of the furs and give in part payment, his note to B. for 300 dollars, to be transferred by B. to A. without its being subject to the demands of C. against B., and that C. would pay the note to A.; that the note in question was made and assigned in pursuance of that agreement. *Held*, on general demurrer, that the replication was good —*Hanna et al.* vs. *Ewing et al.*, 3 Blackf. 34.

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thereto in his answer, and demand relief, and thereupon a summons shall issue, and other proceedings be had against him as if such matter had been exhibited in the original complaint.

Plaintiff may demur to the answer.

SEC. 64. Where the facts stated in the answer are not sufficient to constitute a cause of defense, the plaintiff may demur to one or more of several defenses, under the same rules and regulations as heretofore prescribed for demurring to the complaint. Unless the objection be taken by demurrer, it shall be deemed to be waived.

Answer by guardian, &c.

SEC. 65. It shall be the duty of the guardian of an infant or committee of a person of unsound mind, or attorney appointed for a prisoner, to file an answer, denying the material allegations of the complaint, prejudicial to such defendant, without oath.

SEC. 66. All defenses, except the mere denial of the facts alleged by the plaintiff, shall be pleaded specially.

Reply.

Reply and demurrer thereto.

SEC. 67. When the answer contains new matter, the plaintiff may reply thereto, denying each allegation controverted by him or any knowledge or information thereof, sufficient to form a belief; and he may allege in plain and concise language, without repetition, any new matter not inconsistent with the complaint, and constituting a defense to the answer; the defendant may demur to a reply for any of the causes specified for demurring to a complaint. *

Time of pleading.

Court to call causes for pleas on the 2d day of the term.

SEC. 68. On the second and each succeeding day of the term, the court shall call as many of the causes which stand for trial at such term, for issues, as the business of the court will permit; the court shall call the causes in the order they stand on the docket, and shall compel the parties to file their respective pleadings, and answers to interrogatories, at such time as the court shall deem just, in no case allowing unreasonable delay; and the pleadings shall be completed at an early day of the term.

Judgment *nil dicit*.

SEC. 69. If, from any cause, either party shall fail to plead or make up the issues within the time prescribed, the court shall forthwith enter judgment as upon a default, unless for good cause shown, further time be given for pleading, on the payment of the costs occasioned by the delay.

* See ante, p. 38, section 50, of this chapter.

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What causes may be united—possession and correction of written instruments.

Joinder of Causes of Action.

What causes of action may be united.

SEC. 70. The plaintiff may unite several causes of action in the same complaint, where they are included in either one of the following classes:

First. Money demands on contract;

Second. Injuries to property;

Third. Injuries to person or character;

Fourth. Claims to recover the possession of personal property, with, or without damages for the withholding thereof, and for injuries to the property withheld;

Fifth. Claims to recover the possession of real property, with or without damages, rents and profits for withholding thereof; to make partition of, and to determine and quiet the title to, real property:

Sixth. Claims to enforce the specific performance of contracts, and to avoid contracts for fraud or mistakes.

Seventh. Claims to foreclose mortgages; to enforce or discharge specific liens; to subject to sale real property, upon demands against decedents' estates, when such property has passed to heirs, devisees, or their assigns; to marshal assets; and to substitute one person to the rights of another; and all other causes of action, arising out of a contract or a duty, and not falling within either of the foregoing classes; but causes of action, so joined, must affect all the parties to the action, and not require different places of trial, and must be separately stated and numbered.

The possession and correction of mistakes in instruments of writing.

SEC. 71. When the plaintiff desires to recover the possession of title papers, or other instruments of writing, or correct any mistakes therein, a separate action may be brought therefor; or the possession of such title papers, or other instruments of writing, may be recovered, or mistakes corrected, in any other action, when such recovery or correction would be essential to a complete remedy.

When several causes are united.

SEC. 72. When the action arises out of contract, the plaintiff may join such other matters in his complaint as may be necessary for a complete remedy, and a speedy satisfaction of his judgment, although such other matters fall within some other one or more of the foregoing classes. When several causes of action are united, belonging to any of the foregoing classes, the court may order separate trials for the furtherance of justice.

Rules of Pleading.

SEC. 73. Every pleading in a court of record must be subscribed by the party, or his attorney.

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Allegations not controverted, to be taken as true.

SEC. 74. Every material allegation of the complaint, not specifically controverted by the answer, and every material allegation of new matter in the answer, not specifically controverted by the reply, shall, for the purposes of the action, be taken as true; but the allegation of new matter in a reply, is to be deemed controverted by the adverse party as upon a direct denial, or avoidance, as the case may require. Allegations of value, or amount of damage, shall not be considered as true by the failure to controvert them.

Pleadings sworn to, not to require greater proof.

SEC. 75. Pleadings sworn to by either party, in any case, shall not, on the trial, be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse party, than those not sworn to.

Where an excuse is shown

SEC. 76. When the pleadings show sufficient excuse for not admitting or denying an allegation, such excuse operates as a denial of the truth of the allegation, and to require its proof.

Frivolous demurrers, sham defenses, &c.

SEC. 77. All frivolous demurrers and motions shall be overruled; all sham defences shall be rejected; all surplusage, tautology, and irrelevant matter shall be set aside, when pointed out by the party aggrieved.

Copy of written instrument to be filed with pleading.

SEC. 78. When any pleading is founded on a written instrument or on account, the original or a copy thereof, must be filed with the pleading. A set-off or a counter-claim is within the meaning of this section. Such copy of a written instrument, when not copied in the pleadings, shall be taken as part of the record. The account, if the items are numerous, shall not be copied in the pleadings, nor deemed to be part of the record, unless by order of the court. Any variance between any pleading and copy of a written instrument filed, as to matter of description, or legal effect, may be amended at any time, as of course, before judgment, without causing a continuance.*

Variance and amendment.

Bill of particulars.

SEC. 79. The court, on motion, may order a further bill of particulars, when the one delivered is defective; and may, in all proper cases, upon motion, order a bill of particulars of the claim of either party, and abstracts of title to be furnished.

Execution of a written instrument to be denied before proof thereof.

SEC. 80. Where a writing, purporting to have been executed by one of the parties, is the foundation of, or referred to in any pleading, it may be read in evidence on the trial of the cause against such party, without proving its execution, unless its execution be denied by affidavit before the commencement of the trial, or unless denied by a pleading under oath. The latter party shall, in all cases, have inspection of the instrument of writing before pleading.

Failure of consideration.

SEC. 81. A failure or want of consideration in whole or in part, may be pleaded to any action, set-off, or counter-claim upon or arising out of any specialty bond or deed, except in-

* See post, p. 46, sec. 94, of this chapter, and notes.

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struments negotiable by the law merchant, and negotiated before falling due.

Demand to pay money at a particular place, not necessary.

SEC. 82. In any action or defense founded on a bill or note, or other contract, for the payment of money at a particular place, it shall not be necessary to aver or prove a demand at the place, but the opposite party may show a readiness to pay such demand at the proper place.

Pleading a judgment.

SEC. 83. In pleading a judgment or decision of a court or officer of special jurisdiction, it shall be sufficient to allege, generally, that the judgment or decision was duly given or made. If the allegation be denied, the facts conferring jurisdiction must be proved on the trial.

Condition precedent.

SEC. 84. In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part; if the allegation be denied, the facts showing the performance must be proved on the trial.

Private statute.

SEC. 85. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute by its title, and the day of its approval, and the court shall take judicial notice thereof.

Libel and slander.

SEC. 86. In an action for libel or slander, it shall be sufficient to state generally that the defamatory matter was published or spoken of the plaintiff; and if the allegation be denied, the plaintiff must prove, on the trial, the facts showing that the defamatory matter was published or spoken of him.*

Truth of a slander may be alleged.

SEC. 87. In all actions mentioned in the last section, the defendant may allege the truth of the matter charged as defamatory, and mitigating circumstances to reduce the damages, and give either or both in evidence.

SEC. 88. Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in a pleading.

Property distrained.

SEC. 89. In an action to recover the possession of property distrained doing damage, an answer that the defendant, or person by whose command he acted, was lawfully possessed of the real property upon which the distress was made, and that the property distrained was at the time doing damage thereon, shall be good without setting forth the title of such real property.

Pleading to be liberally construed.

SEC. 90. In the construction of a pleading for the purpose of determining its effects, its allegations shall be liberally construed with a view to substantial justice between the parties; but when the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment.

SEC. 91. Under a mere denial of any allegation, no evi-

* See article XLVII of this chapter

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dence shall be introduced which does not tend to negative what the party making the allegation is bound to prove.

Fictitious pleading.

SEC. 92. All fictions in pleading are abolished, and their use forbidden in the courts of justice in this State.

Copy of a lost paper.

SEC. 93. If an original pleading or paper be lost or withheld by any person, the court may authorize a copy thereof to be filed, and used instead of the original.

Variances and Amendments.

Variance not to be deemed material, unless the opposite party is misled.

SEC. 94. No variance between the allegations in a pleading and the proof, is to be deemed material, unless it have actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must be shown in what respect he has been misled; and thereupon the court may order the pleading to be amended upon such terms as may be just. *

When the variance is not material.

SEC. 95. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs.

* See ante, p. 44, sec. 78, of this chapter.

A variance as to the date of a bond sued on is material.—*Comparet et al.* vs. *The State*, 7 Blackf. 553.

The clerk of the circuit court, in entering of record a justice's transcript, &c., which was on file and certified to under the hand and seal of the justice, omitted the seal to the certificate. *Held*, that the mistake might be amended.—*Wiley* vs. *Forsee*, 6 Blackf. 246.

The clerk having omitted to state in a *capias ad respondendum* the nature of the action or amount claimed, it was held that the mistake might be amended by the *præcipe*.—*The State* vs. *Hood et al.*, 6 Blackf. 260.

If a bond sued on be described in the declaration as joint and several, and the bond produced on *oyer* be joint only, the variance is material.—*Sherry et al.* vs. *Foresman et al.*, 6 Blackf. 56.

If an instrument of writing be stated in pleading to have been made on such a day, without alleging when it was dated, an instrument dated on a different day from that stated may be given in evidence.—*Remington* vs. *Henry*, 6 Blackf. 63.

See *Anderson* vs. *Hamilton*, 6 Blackf. 94.

Where the declaration on a delivery bond stated that the goods were to be delivered at the farm of *D. McKay* on the twentieth of June, and the condition of the bond was for the delivery of the goods on the second of June, at the house of said *McKay*, the variance was held to be material.—*McKay et al.* vs. *Craig*, 6 Blackf. 168.

A *scire facias* in favor of the State on a recognizance alleged, that, at a circuit court, &c., before the president judge and one of the associates (naming them,) *James Mowbray* was impleaded with *George Saxton* in an indictment for murder; that the cause was continued as to *Mowbray*; that he and the defendant, *Morris Saxton*, acknowledged themselves to owe and be indebted to the State, &c.; and that, on the 13th of Sept., 1843, the defendant made default, &c. Plea, *nul tiel record*. The record offered in evidence by the State showed that the indictment was against said *Mowbray*, and *George* and *Ashford Saxton*; and it also showed that the entry of the default was made on the 14th of Sept., 1843. The evidence was objected to on account of the variances, but the objection was overruled. Judgment for the State. *Held*, that under the statute, the *scire*

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Variances—what deemed only failure of proof.

SEC. 96. When, however, the allegation of the claim or defense, to which the proof is directed, is unproved, not in some particular or particulars only, but in its general scope

What deemed not a variance, but a failure of proof.

facias might have been so amended at the trial, by leave of the court, as to have made it agree with the record. *Held*, also, that under the statute, the judgment could not be reversed because the variances were disregarded by the court below. *Held*, also, that the recognizance, as shown by the *scire facias*, was taken before a competent tribunal.—*Saxton* vs. *The State*, 8 Blackf. 200.

See *Legate et al.* vs. *Murr*, 8 Blackf. 404.

A bond sued on was described in the declaration as payable to "the President and Trustees of the town of Fort Wayne." The bond shown on *oyer* was payable to "the President and Trustees of the Fort Wayne corporation." *Held*, that the variance was fatal.—*The President &c., of Fort Wayne* vs. *Jackson et al.*, 7 Blackf. 36.

In a suit on a promissory note, the declaration professing to set out only the legal effect of the note, omitted the words "For value received," which the note contained. *Held*, that the variance was immaterial.—*Chapman* vs. *Ellison*, 7 Blackf. 46.

Evidence that the defendant had beaten *Catharine Swails*, will not support an indictment for an assault and battery on *Ratherine Swails*.—7 Blackf. 324.

The variance between the names of *Owen Adanson* and *Owen Adamson*, is immaterial, the principle of *idem sonans* applying.—*James* vs. *The State*, 7 Blackf. 325.

The declaration alleged that the defendant by his note, acknowledged himself indebted *to the plaintiff*. *Held*, that a note by which the defendant acknowledged himself indebted *to the estate of C. D. deceased*, was inadmissible on the ground of variance.—*McKinney* vs. *Harter*, 6 Blackf. 320.

In debt on bond, the declaration alleged the condition to be for the payment of a certain sum of money on a certain day. The condition was for the payment of the money out of the profits of certain real estate. *Held*, that the variance was fatal.—*Irish* vs. *Irish*, 6 Blackf. 438.

Debt on a promissory note payable eight months after date. The plaintiff offered in evidence the following note made by the defendant: "Eight months after date, I promise to pay, &c., the sum of, &c., to be paid as soon as I get my returns from New Orleans, or the above date at farthest." *Held*, that there was no variance.—*Hoover* vs. *Johnson*, 6 Blackf. 473.

Declaration stating the note to be for the payment of a sum of money at a future day with interest, and if the interest were not punctually paid annually, the principal to be immediately payable. The note agreed with the description in the declaration, except that it set out the consideration, which was a certain tract of land, and stating that if the interest were not punctually paid annually, *or the obligor should sell the land before the note fell due*, &c. *Held*, that the variance was not material.—*Vandevender et al.* vs. *Pittsford*, 6 Blackf. 197.

In assumpsit brought by the administrator of *Thomas Newman*, for money had and received to the use of the intestate, &c., a promissory note by the defendant payable to *T. T. Newman*, is admissible evidence.—*Lowe* vs. *Bowman*, 5 Blackf. 410.

Although the libel read in evidence contain matter in addition to that set out in the declaration, there is no variance if the additional part do not alter the sense of that which is set out.—*McCombs* vs. *Tuttle*, 5 Blackf. 431.

In a suit by *Alexis Coquillard* on a promissory note averred in the declaration to be payable to the plaintiff, a note payable on its face to *A. Coquillard* is admissible evidence; and the possession of the note by the plaintiff is *prima facie* evidence that the plaintiff is the payee.—*Taylor* vs. *Coquillard*, 5 Blackf. 158.

See notes to title "Notes, Promissory," R. S. Vol. 1, page 379.

Debt by the assignee of a sealed note against the maker, the declaration setting out an assignment in full. The assignment appeared, on oyer, to be in blank. *Held*, that the variance was immaterial.—*Bowers* vs. *Trevor*, 5 Blackf. 24.

Debt against three persons on a bond declared on as joint. The bond was joint and several. No variance.—*Grant et al.* vs. *Whiteman*, 5 Blackf. 67.

The declaration in assumpsit described the written contract sued on to be for the execution of notes for the price of certain books and stationery purchased of the plaintiff by the defendant. The contract produced in evidence was only for

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and meaning, it is not to be deemed a case of variance within the last two sections, but a failure of proof.

Amendments.

SEC. 97. Any pleading may be amended by either party of course at any time before the pleading is answered. All other amendments shall be by leave of the court. The party amending shall pay the costs of the leave to amend. When the trial is not delayed by reason of the amendment, no other costs shall be taxed. When the amendment causes a delay during any part of the term, or to another term, the party amending shall pay the costs of such delay. No cause shall be delayed by reason of an amendment, excepting only the time to make up issues, but upon good cause shown by affidavit of the party or his agent asking such delay.

Affidavit for delay.

SEC. 98. The affidavit shall show distinctly in what respect the party asking the delay has been prejudiced in his preparation for trial by the amendment. When the action is continued for such cause, the party asking the delay shall file his pleadings at such time as the court may direct.

Court may direct certain amendments to be made.

SEC. 99. The court may at any time, in its discretion, and upon such terms as may be deemed proper, for the furtherance of justice, direct the name of any party to be added or struck out; a mistake in name, description, or legal effect, or in any other respect, to be corrected; any material allegation to be inserted, struck out, or modified to conform the pleadings to the facts proved; when the amendment does not substantially change the claim or defense. The court may also, in its discretion, allow a party to file his pleadings after the time limited therefor; and at any time within one year relieve a party from a judgment taken against him through

the executing of notes for the price of the books purchased. Fatal variance.—*Buckley* vs. *Stanly*, 5 Blackf. 162.

The declaration described the *fi. fa.* to have issued on a judgment for 57 dollars and 48 cents. The *fi. fa.* offered in evidence showed the judgment to be for 57 dollars and 43 cents. No variance.—*Turner* vs. *The State*, 5 Blackf. 254.

If the plaintiff allege that a promissory note was made payable to him, and on proof of the instrument it appears to have been made to another, it is no variance if the plaintiff show that he was the person really meant.—*Leaphart* vs. *Sloan*, 5 Blackf. 278.

A note dated on the twenty-fifth of June, 1838, payable one day after date, cannot be given in evidence to support a declaration on a note alleged to have been made on the fifth of June, 1839, payable one day after date.—*Reid* vs. *Cox*, 5 Blackf. 312.

See *Ramsey et al.* vs. *Herndon*, 5 Blackf. 345.

In debt on a judgment for 67 dollars and 71 cents damages, and 7 dollars and 55 cents costs, a transcript of a judgment for 67 dollars and 71 cents damages and also costs, is inadmissible as evidence on the ground of variance.—*Hern* vs. *Allison*, 5 Blackf. 347.

In a suit against a carrier, the declaration stated the goods to have been delivered to the defendant on board a schooner to be safely carried from Michigan City to Buffalo, &c., "the dangers of the seas only excepted." The exception contained in the bill of lading offered in evidence by the plaintiff was "the dangers of the lakes and rivers excepted." *Held*, that the variance was immaterial. *Harrison et al.* vs. *Hixson et al.* 4 Blackf. 226.

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his mistake, inadvertance, surprise, or excusable neglect, and supply an omission in any proceedings.*

In a suit against *Elisha Harris*, alias *Elisha B. Harris*, a judgment against *Elisha Harris* was objected to as evidence on the ground of variance. The objection is untenable. *Harris* vs. *The Muskingham M. Co.*, 4 Blackf. 267.

Covenant on a lease of a tavern with certain articles for house-keeping. Among the articles specified in the declaration, are termed *two washpans* and *one pair of waffle*. The lease produced on *oyer* mentions the same articles with those set out in the declaration, but describes the three above named as *two wash-pans* and *one pair of waffle-irons*. The lease produced showed also that several words in it, (which were in the declaration) had been crossed with a pen, but in such a manner as to leave them legible. The declaration did not profess to set out the lease *in hæc verba*. *Held*, that a demurrer for the variance could not be sustained. —*Lynch* vs *Wilson*, 4 Blackf. 288.

When the pleader professes to give the tenor of a writing, or when *oyer* of a deed is given and *non est factum* pleaded, or when a record is described and *nul tiel record* pleaded,—verbal variances, except in cases of misspelling where the *idem sonans* is preserved and the sense of the word is not changed, are fatal.—*Ibid.*

* If land be sold on execution which, as to the amount, varies from the judgment, the purchaser, or person claiming under him, may have the execution amended by the judgment.—*Doe* vs. *Rue*, 4 Blackf. 263.

A mistake in the amount of an execution, is amendable, at any time, by the judgment.—*McCall* vs. *Trevor*, 4 Blackf. 496.

Joel Williams filed a præcipe in his right name for a writ; the clerk issued the writ in the name of Joel Williamson, and the plaintiff declared in his right name. *Held*, that the writ, as to the plaintiff's name, might be amended by the præcipe. —*Beck* vs. *Williams*, 5 Blackf. 374.

The making of such an amendment does not entitle the defendant to a continuance.—*Ibid.*

Assumpsit on a promissory note. The præcipe and declaration set out the christian and surnames of the plaintiffs, but the writ was in favor of "W." & "H.," omitting their christian names. The court permitted the writ, after the declaration had been filed, to be amended so as to correspond with the præcipe and declaration, and refused to the defendants a continuance on that account. *Held*, that there was no error in this.—*Nimmon* vs. *Worthington*, 1 Carter's Ind. Rep. 376.

The defendants objected to a note for 308 dollars and 88 cents, which was described in the declaration as a note for 388 dollars and 88 cents. The court permitted the plaintiffs to amend their declaration so as to conform to the note. *Held*, that there was no error in this.—*Ibid.*

Assumpsit against A., B., C., D., E., and F., on a promissory note. Plea, the general issue sworn to by C., D., E., and F. It was proved on the trial that the names of the defendants had been put to the note by A., who was authorized to sign the names of B., E., and F.; but there was no proof of his authority to sign the names of C. and D. The plaintiff then by leave of the court, amended his writ and declaration by striking out the names of C. and D.; the other defendants, on account of said amendment, moved for a continuance at the plaintiff's costs, but the motion was overruled, and the note, though objected to, was admitted in evidence. *Held*, that there was no error in these proceedings.—*Taylor et al.* vs. *Jones*, 1 Carter's Ind. Rep. 17.

A writ of replevin, addressed to the sheriff, was delivered to and executed by the coroner. A motion was made to quash the writ. The court permitted the plaintiff to amend the writ by substituting the word "coroner" for sheriff in the address. *Held*, in this there was no error.—*Simcoke* vs. *Frederick et al.*, 1 Carter's Ind. Rep. 54.

Covenant. The writ designated the plaintiff as "guardian," &c. The declaration which was founded upon a lease of real estate of the plaintiff's wards, executed by him, commenced as follows: "Jacob Walker, who sues as guardian," &c. The plaintiff obtained leave to amend by striking out the words "who sues as," and cause continued at plaintiff's costs. *Held*, that there was no error in this.—*Huff et al.* vs. *Walker*, 1 Carter's Ind. Rep. 193.

Debt on official bond against Stephen S. Colms et al. *Non est factum* pleaded. A bond signed by Stephen H. Colms was offered in evidence, which was objected

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Name of the defendant.

SEC. 100. When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding may be amended accordingly, either before or after service of the summons.

Certain defects to be disregarded.

SEC. 101. The court must in every stage of the action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party, and no judgment can be reversed or affected by reason of such error or defect.

Supplemental pleadings.

SEC. 102. The court may on motion allow supplemental pleadings, showing facts which occurred after the former pleadings were filed.

ARTICLE VI.

Arrest and Bail.

SEC. 103. A defendant in a civil action can be arrested and held to bail only upon the conditions and in the manner prescribed in this chapter.

Order of arrest.

SEC. 104. An order for the arrest of the defendant shall be made by the court in term time, in which the action is brought, or by the clerk thereof in vacation, at the commencement of the action, or any time before judgment, when there is filed in the office of such clerk an affidavit* of the plaintiff, his agent or attorney, specifying the plaintiff's right to recover an existing debt, or damages from the defendant, and stating that he believes the defendant is about to leave the State, taking with him property subject to execution, or money or effects which should be applied to the payment of

to, and the court sustained the objection. *Held*, that this decision was right.—*State ex. rel.* vs. *Geddes*, 1 Carter's Ind. Rep. 577.

See *Weaver et al.* vs. *Jackson*, 8 Blackf. 5.

A *scire facias* against A. and B. was returned served on the former, and "not found," as to the latter. Judgment by default against both defendants. *Held*, that the mistake in rendering judgment against B., was a clerical error, and might be amended.—*McManus* vs. *Richardson et al.*, 8 Blackf. 100.

The supreme court amended said mistake, both parties agreeing that if the court below could make the amendment, the supreme court might make it.—*Ibid.*

See *Roberts* vs. *Ward*, 8 Blackf. 333; *Mesick* vs. *Hoover*, 8 Blackf. 379: *Helms* vs. *Sisk*, 8 Blackf. 503.

The circuit court, on appeal from an award of damages made under the improvement act of 1836, permitted the claim to be amended. *Held*, that the leave to amend, the record not showing what the amendment was, must be presumed to be correct.—*The State* vs. *Beackmo*, 8 Blackf. 246.

* In actions on tort there must be a positive affidavit of facts, sufficient to enable the court or judge to determine the *quantum* of the bail. In actions on contract, the affidavit, whether made by the plaintiff himself or by a third person,

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the plaintiff's debt or damages, with intent to defraud the plaintiff.

Undertaking to pay damages and costs.

SEC. 105. The order of arrest shall not be issued until there has been executed and filed, in the office of the clerk of such court, by one or more sufficient sureties of the plaintiff, to be approved by the clerk or court making the order, a written undertaking to the effect that the plaintiff shall pay to the defendant all damages which he may sustain by reason of the arrest if the order is wrongfully obtained, not exceeding double the amount of the plaintiff's claim stated in the affidavit.

To whom order addressed, and what to contain.

SEC. 106. The order of arrest shall be addressed and delivered to the sheriff. It shall state the names of the parties to the action, the court in which the action is brought, and the amount of the plaintiff's claim specified in the affidavit, and shall require the sheriff to arrest the defendant and hold him to bail in the sum of the plaintiff's claim, with the costs of the action, and to make return of the order on a day to be named therein, with the recognizance, if any is taken.

Arrest.

SEC. 107. The sheriff shall execute the order by arresting the defendant, and keeping him in custody until discharged by law.

Recognizance of special bail.

SEC. 108. When an order of arrest and bail is executed, the sheriff shall take a recognizance of special bail of some responsible person resident of this State, in substance that the surety acknowledges himself special bail for the defendant in the action, which shall be indorsed on the order of arrest, and signed by the surety, and shall have the force and effect of a recognizance of special bail, and be obligatory as such.*

must show that there is, at the time of suing out the writ, an existing debt actually due, for which an arrest may be lawfully made. It must be positive as to the sum due, and not as the deponent believes, nor as appears by an account stated, nor as appears by an agreement dated at such a day. The case of executors, administrators and assignees, is an exception: they need only swear as to their belief. The sum specified in the affidavit or order of bail, is endorsed on the writ.—*Lewis* vs. *Brackenridge*, 1 Blackf. 112.

See *Cutshaw* vs. *Birge*, 4 Blackf. 511.

See *The State Bank* vs. *Seaman et al.*, 8 Blackf. 181, and *James* vs. *The State*, 7 Blackf. 325.

In debt on a recognizance indorsed on process requiring special bail, if some of the issues are on pleas of *nul tiel record*, and the others on pleas of payment, and are all found for the plaintiff, the former by the court, and the latter by the jury, the jury should find the amount due the plaintiff.—*Bolles* vs. *Haines*, 7 Blackf. 398.

The recognizance for special bail need not be under seal.—*Scott* vs. *Brokaw*, 5 Blackf. 457.

See *Hysinger* vs. *Colman*, 5 Blackf. 596.

* An endorsement of a recognizance of bail on a *capias ad respondendum* returned to the clerk's office, the defendant not being a party to the recognizance, is no evidence of the service of the writ.—*Miller* vs. *Bottorff et al.*, 6 Blackf. 30.

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Return.

SEC. 109. It shall be the duty of the sheriff to return the order of arrest to the office whence it issued, immediately upon taking and approving of the recognizance of special bail, when bail is taken; and in all other cases, on the return day. And in all cases the officer shall indorse his doings thereon.

Recognizance, what to contain.

SEC. 110. Any such recognizance of special bail shall only amount to an undertaking that the defendant will surrender his body or the money, property and effects, or the value thereof, held or owned by him at the time of making such affidavit, and in default of such surrender the surety in such recognizance shall only be liable for the amount of the property, moneys and effects, which the plaintiff may show the defendant to have held or owned at the time of making such affidavit exceeding the amount exempt from execution.

Habeas corpus, when may be sued out.

SEC. 111. When any person shall be committed to prison on an order of arrest, for want of special bail, he may sue out a writ of *habeas corpus* in any court or before any judge of competent jurisdiction, and on the return thereof, the plaintiff shall be compelled to show that the facts alleged in the affidavit, on which the defendant is held to bail are true, and on failure to do so, the defendant shall be discharged.

How long held in prison.

SEC. 112. When any person is committed for want of bail, he shall be held in prison unless he is bailed or otherwise legally discharged, until final judgment in the action in which he is arrested, and if the judgment be against him, he shall be held for such time thereafter as the court shall direct, not exceeding ten days.

Insufficiency of bail.

SEC. 113. If the plaintiff deem the bail insufficient, he may, at the term to which the writ is returnable, or at any term thereafter, before final judgment, object to the sufficiency of the bail by giving three days' notice of the objection to the sheriff.

Determination of the court as to bail.

SEC. 114. At the time specified in such notice, the court shall proceed to hear and determine as to the sufficiency of the bail; if adjudged insufficient, and other bail, approved by the court, is not given, the bail shall not be thereby discharged, but may be proceeded against by the plaintiff; and if he cannot recover the amount for which such bail may have become liable, the sheriff shall be liable on his official bond for the same, or so much as may remain unsatisfied, and for the costs of the action against the bail.

Sheriff, when not liable.

SEC. 115. The sheriff shall not be liable to the plaintiff on account of the insufficiency of the bail, if it shall appear that he acted with due care in accepting the same.

Who may make affidavit.

SEC. 116. Affidavits of the plaintiff's right to the debt or damages which he claims, may be made by any person residing in this or any other State, territory or country, and additional affidavits may be made by other persons, stating the further

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grounds necessary to obtain an order for arrest and bail, and upon filing such affidavits, duly authenticated, an order for the arrest and bail may be entered as in other cases.

Surrender of Principal by Special Bail.

When the bail is exonerated.

SEC. 117. The bail may be exonerated either by the death of the defendant, or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested in execution thereof, at any time before final judgment against the bail on his recognizance.*

May deliver up principal.

SEC. 118. The bail may at any time take a certified copy of the order of arrest and recognizance, by virtue of which he may take his principal and deliver him into the custody of the proper officer. Such copy shall be given and certified by the clerk.

Surrender may be made in open court.

SEC. 119. If the court to which the order of arrest is returnable, is in session at the time of the surrender, the same may be made in open court, and the court shall cause the discharge of the bail from all further liability, to be entered of record.

Surrender may be made to sheriff.

SEC. 120. If the court is not in session, the surrender may be made to the sheriff or keeper of the jail of the proper county, who shall receive the prisoner and hold him in custody in like manner as if he had been committed by virtue of the order of arrest on which he was held to bail.

Copy of order of arrest, &c., to be delivered.

SEC. 121. But the sheriff or jailer shall not be bound to receive any person so surrendered unless the bail shall deliver to him a copy of the order of arrest and recognizance, certified by the officer who issued the original order of arrest.

Endorsement on order.

SEC. 122. The sheriff or the keeper of the jail, shall acknowledge the reception of the principal by an endorsement

* The bail cannot, in any action against them, plead any error in the judgment against the principal, nor can they have a writ of error for its reversal. On the return of the *ca. sa. non est*, the bail are fixed, but the proceedings against them by *scire facias* will be stayed on payment of costs upon the render of the principal. A discharge under a bankrupt or insolvent law is equivalent to a surrender.—*Lewis vs. Brackenridge.* 1 Blackf. 112.

When the bail are absolutely fixed, and have no further time, the right of the judgment-creditor to his debt from the bail is a vested right, arising *ex contractu*, of which right no subsequent legislative act can deprive him.—*Ibid.*

The bail has a right to an *exoneretur* without a render of the principal, in cases where the latter, if rendered, would be entitled to an immediate discharge.—*White et al. vs. Guest*, 6 Blackf. 228.

An *exoneretur* entered on motion of the bail after an action commenced against him, is a good ground for dismissing the suit at the costs of the bail.—*Ibid.*

A suit on a recognizance of special bail was pending when the act abolishing imprisonment for debt took effect. *Held*, that it was not the immediate effect of the act to defeat the further maintenance of the suit; but that, without a render of the principal, the bail might have an *exoneretur* entered, and have the suit dismissed at his own costs.—*Scott vs. Brockaw*, 6 Blackf. 241.

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on the certified copy of the order of arrest; and the surrender shall acquit the bail from all further liability as special bail.

SEC. 123. Every defendant surrendered by his bail, may be bailed as if arrested by the original order of arrest.

Notice to plaintiff upon a surrender.

SEC. 124. When the surrender of the principal is made after final judgment against him, the bail shall, within ten days after, cause notice of the time and place thereof to be given to the plaintiff or his attorney, if either reside in the State, which notice shall be served by the sheriff, who shall deliver a certified copy of the notice to the keeper of the jail, on or before the expiration of ten days from the time of the surrender; but if neither the plaintiff nor his attorney reside in the State, the notice shall be posted up ten days in the clerk's office of the county, and a copy of the notice, certified by the clerk, shall be forthwith thereafter delivered to the keeper of the jail.

Disposition of the defendant.

SEC. 125. When the surrender is made after judgment, the prisoner shall be detained in custody; but if the plaintiff shall not proceed to charge him in execution within five days after the notice, the defendant shall be discharged from custody without any order for that purpose.

Failure to give notice.

SEC. 126. If any bail shall fail to give the required notice to the plaintiff or his attorney, and the principal shall be discharged, no proceedings being commenced to charge him in execution, the bail shall remain liable to his recognizance.

When to commence suit against bail.

SEC. 127. Whenever the right of action has accrued against any special bail, the creditor may at any time within two years after final judgment against the principal, and not afterwards, maintain an action upon the recognizance in his own name.

CHAPTER VII.

Claim and Delivery of Personal Property.

Action for possession.

SEC. 128. When any personal goods are wrongfully taken or unlawfully detained from the owner or person claiming the possession thereof, or when taken on execution or attachment, are claimed by any person other than the defendant, the owner or claimant may bring an action for the possession thereof.*

* The action of replevin is not limited to cases of distress, but lies in all cases of a tortious and unlawful taking and detention of goods and chattels.—*Dagget vs. Robbins*, 2 Blackf. 415.

Replevin lies by a person not having the actual possession of goods when taken, provided he have at the time the general property, and the right of immediate possession.—*Chinn vs. Russell*, 2 Blackf. 172.

To sustain replevin, the plaintiff must have the general or special property in

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Recovery of possession of personal property—affidavit.

SEC. 129. The plaintiff may, at the time of issuing the summons, or at any time before answer, claim the immediate delivery of such property, as provided in this chapter [article;] Affidavit.

the goods, and a right to their immediate possession.—*Walpole* vs. *Smith*, 2 Blackf. 304.

If goods seized by virtue of a legal precept or execution, be unlawfully taken out of the hands of the officer executing such process, he can support an action, of replevin for them against the wrong-doer.—*Fitch* vs. *Dunn*, 3 Blackf. 142; *Walpole* vs. *Smith*, 4 Blackf. 304.

The right of action ceases with the extinguishment of the special property of the claimant. A bailor cannot sue his bailee for a return, after his right of property in the thing bailed has been destroyed. When an execution and levy have been set aside, the officer's right of property acquired by the levy ceases.—*Walpole* vs. *Smith*, 4 Blackf. 304.

If the plaintiff, in an action of replevin, be nonsuited, he is not thereby barred from bringing another action of replevin; the merits of the cause not having been tried. This is the common law, and the statute in *England*, of Ed. I. prohibiting a second replevin after a nonsuit, is local to that kingdom and not in force here.—2 Blackf. 415.

Replevin. *Pleas*, 1. That the defendant had not taken or detained the property. 2. Property in a stranger. 3. Property in the defendant. The plaintiff joined issue on the first plea, and replied to the second and third, property in himself. Verdict: "We find the property to be in the plaintiff." Judgment against the defendant for costs. *Held*, that this verdict did not authorize a judgment for the plaintiff, as the jury had not found that the horse had been taken or detained by the defendant.—*Huff* vs. *Gilbert*, 4 Blackf. 19.

A plea that the property of the goods is in a stranger, not in the plaintiff, is a good bar to the action of replevin.—*Martin et al.* vs. *Ray*, 1 Blackf. 291.

NOTE.—See forms of pleas of property in a note to *Martin* vs. *Ray*, 1 Blackf. 292. For the form of replication see *Litteral* vs. *St. John*, 4 Blackf. 326, note 1. See title Landlord and tenant, R. S., vol. 2, where the remedy for recovery of rent by distress is abolished. [This decision is inserted here for reference merely.]

The defendant in replevin avowed the taking of the goods as a distress for rent due to him from the plaintiff. To this avowry the plaintiff pleaded *non tenuit* and *rens in arrear*. Issues were joined upon these pleas. There was a verdict for the defendant on both the issues; the jury finding the amount of the rent, in arrear, but not the value of the goods distrained. The court *held*, that the common law judgment for a return of the goods to the defendant, and for his costs of suit, might be rendered on this verdict; but that there could be no judgment in his favor for the arrears of rent.—*Larkin* vs. *Wilburn*, 2 Blackf. 343. *Given* vs. *Blann*, 3 Blackf. 64.

The plaintiff in replevin must recover by the strength of his own title, and, when it is not admitted by the pleadings, it must be proved.—*Simcoke* vs. *Frederick et al.*, 1 Carter's Ind. Rep. 54.

If the plaintiff in an action of replevin show a *prima facie* right to the possession of the property, the verdict should be in his favor, unless the defendant prove a better title.—*Ingersoll et al.* vs. *Emerson*, 1 Carter's Ind. Rep. 76.

In replevin the issuing of the writ is the commencement of the suit, and demand must be made before that time.—*Underwood* vs. *Tatham*, 1 Carter's Ind. Rep. 276.

To sustain replevin the plaintiff must have the right to possession of the property replevied.—*Bradley* vs. *Michael*, 1 Carter's Ind. Rep. 551.

A. contracted with B. for a lot of cattle, and paid a portion of the purchase money, and took part of the cattle away on the day of purchase, and was to return and pay another portion of the amount, and take the remaining cattle; he returned, but did not pay the money as agreed, and B. refused to let him have the cattle. *Held*, that the right of possession was in B., and A. could not maintain replevin until he had made a tender of the stipulated balance, which was the condition precedent.—*Ibid.*

It is not often that a demand is necessary to sustain an unlawful detention of goods.—*Lewis* vs. *Masters*, 8 Blackf. 244.

When the defendant has the goods by the leave and license of the plaintiff, a demand may be necessary in order to render the possession wrongful.—*Ibid.*

But whenever there is, without such demand, a wrongful possession of goods,

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Recovery of the possession of personal property.

Affidavit, what facts to set forth

when a delivery is claimed, an affidavit must be made by the plaintiff, or some one in his behalf, showing:

First. That the plaintiff is the owner of the property, or that he is then lawfully entitled to the possession thereof, and particularly describe it.

Second. That the same has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or if so seized, that it is by statute exempt from such seizure.

Third. That the property has been wrongfully taken and is unlawfully detained by the defendant, or is unlawfully detained; and,

Fourth. The estimated value of the property, and in what county the same is believed to be detained.

SEC. 130. When such affidavit is filed with the clerk, he shall issue an order for the seizure of the property, and delivery thereof to the plaintiff.

as where they were obtained by force, fraud, or otherwise, without the owner's consent, no demand need be made.—*Ibid.*

In replevin by the assignee of a bankrupt, the defendant may give in evidence the statements of the bankrupt, made before his application for the benefit of the bankrupt law, to prove the property to be in a stranger.—*Compton* vs. *Fleming*, 8 Blackf. 153.

But the plaintiff cannot prove the admissions of such stranger that the property belonged to the bankrupt; the stranger himself being a competent witness for the plaintiff.—*Ibid.*

The warrant of a justice of the peace issued under the statute of 1824, commanding the constable to distrain for rent, is a justification to the officer in an action of replevin by the tenant, independently of the landlord's claim. *Harris* vs. *McFaddin*, 2 Blackf. 71.

If the action of replevin be brought alone against the officer making the distress under the justice's warrant, and such officer justify under his warrant, and obtain judgment on a demurrer to his plea, he is entitled to a return of the goods.—*Ibid.*

If the tenant wish to contest the landlord's right to distrain—to rely, for example, on *non tenuit* or *riens* in arrear—he should institute his suit against the landlord.—*Ibid.*

If an action of replevin be brought for taking several articles, and, on an issue as to the plaintiff's property in them, he only prove himself entitled to a part, the defendant has a right to a return of the others, and to damages for the taking of them. In such case each party succeeds and each is entitled to his costs.—*Wright* vs. *Mathews et al.*, 2 Blackf. 187.

Replevin. The first count charged the tortious taking and unlawful detaining of the plaintiff's horse. The writ commanded the sheriff to summon the defendant to answer the plaintiff concerning the unlawful detention of the plaintiff's, &c. *Held*, on demurrer to that count, that the variance was fatal.—*Barnes* vs. *Tannehill*, 7 Blackf. 604.

To the second count, which was for unlawfully detaining the plaintiff's horse, the defendant pleaded, that at the time, &c., viz: on the 20th of June, 1840, at the county aforesaid, the horse was taken up by the defendant as an estray, he being then and there going astray, at defendant's place of residence in Indian Creek township, in said county, and the defendant being then and there a freeholder; that by virtue of said taking up of the horse, the defendant had a right to detain him, and did detain him, until as hereinafter mentioned; that afterwards, to wit: on the 22d of June, 1840, at said county, the defendant, pursuant to law, caused said taking up of the horse to be advertised in three of the most public places in said township, giving in the advertisement a particular description of

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Order of seizure—seizure—property concealed.

Order for seizure

SEC. 131. The order shall be directed and delivered to the sheriff. It shall state the names of the parties to the action, and the court in which the action is brought, and direct the sheriff to take the property, describing it, and stating its value, as in the affidavit, and deliver it to the plaintiff, and direct him to make return of his doings thereon.

Execution of the order.

SEC. 132. The sheriff shall forthwith proceed to execute the order by taking possession of the property described in the affidavit, or so much as can be found; but before delivering the property to the plaintiff, the sheriff shall take from him, or some person on his behalf, a written undertaking, payable to the defendant, with sufficient surety, to be approved by the sheriff, to the effect that the plaintiff will prosecute his action with effect and without delay, and that he will return the property to the defendant, if return be adjudged by the court, and that he will pay to the defendant all such sums of money as may be recovered against him by the defendant in the action for any cause whatever; which written undertaking shall be delivered to the sheriff within twenty-four hours after seizing the property, and in default thereof the property shall be returned to the defendant, but the action shall not be dismissed or delayed thereby.*

In case the property is concealed.

SEC. 133. If the property, or any part thereof, be concealed in a building or enclosure, the sheriff shall demand its delivery; if it shall not be delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of the county: if the sheriff cannot find the property or any part thereof, the action shall not abate, but be prosecuted to final judgment.

the horse, and the time when he was taken up; that afterwards, to-wit: on the 25th of June, 1840, and before ten days had expired after advertising as aforesaid, the plaintiff brought this action of replevin, by virtue of which he then and there obtained possession of the horse, &c. *Held*, that the plea was good.—*Ibid.*

See *Lewis* vs. *Masters*, 6 Blackf. 243; *Gentry* vs. *Bargis et ux.*, 6 Blackf. 261; *Richardson et al.* vs. *Adkins*, 6 Blackf. 141; and *Andre* vs. *Johnson*, 6 Blackf. 188.

A declaration in replevin by husband wife, should show specially the wife's interest.—*Gentry* vs. *Bargis et ux.*, 6 Blackf. 261.

If a defendant in replevin plead property in himself, and obtain a verdict in which damages are assessed in his favor, he is entitled to a judgment for a return of the goods and for costs, but not for the damages assessed, that being surplusage.—*Wolf* vs. *Blue*, 5 Blackf. 153.

* In an action on a replevin-bond the plaintiff cannot recover the fees paid to his lawyer in the replevin suit, nor compensation for his own attendance at court in that suit, nor his lawyer's fees paid in the suit on the bond.—*Davis et al.* vs. *Grow*, 7 Blackf. 129.

A constable seized some horses of A., on an execution against him, and delivered them to B. to be kept. A., without satisfying the execution, tendered to B. the amount of the expenses of keeping the horses, and demanded them. B. having refused to deliver the horses, A. replevied them, and afterwards suffered a

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Recovery of possession of personal property.

Sheriff to keep the property, &c.

SEC. 134. The sheriff shall safely keep the property during the time prescribed by the statute, and shall be allowed by the court the necessary expense of doing so, to be paid by the plaintiff, and taxed in the costs if the property is recovered by the plaintiff; when it appears by the affidavit of the plaintiff, or other person on his behalf, or by the return of

non-suit in the action of replevin. Held, in a suit by B. against A. and his sureties on the replevin-bond, that the plaintiff was entitled to recover in damages a reasonable charge for the keep of the horses, and that he was not bound to receive the money tendered.—*Ibid.*

To debt on a replevin bond, a plea that the goods replevied belong to the principal obligor is bad.—*Wallace et al.* vs. *Clark*, 7 Blackf. 298. But on the execution of a writ of inquiry, after judgment in such suit for the plaintiff on demurrer, evidence of such ownership is admissible in mitigation of damages.—*Ibid.*

A replevin bond executed on Sunday is void.—*Link* vs. *Clemmens*, 7 Blackf. 479.

When goods were replevied on Saturday, and the statute required the replevin bond to be executed within twenty-four hours after the replevy, it was held that Sunday in such case, should not be counted.—*Ibid.*

The sheriff cannot object to the replevin bond because it is not executed by the tenant, but by his surety alone.—*Ridge* vs. *Wilson et al.*, 1 Blackf. 409.

If goods taken on a distress-warrant be replevied without objection to the replevin bond, and the time limited by law to replevy be expired, they cannot be retaken by virtue of such distress warrant on the ground that the replevin surety is insufficient.—*Ridge* vs. *Wilson et al.*, 1 Blackf. 409.

The sheriff is liable to an action on the case if he do not take such sureties as the law contemplates. It is held, however, under the statute of Geo. II, which is similar to ours, that the sheriff does not warrant the sufficiency of the sureties. If they were apparently good when taken, and the sheriff acted faithfully and with a reasonable degree of caution, he is excusable.—*Hindle* vs. *Blades*, 5 Taunt. 225.—*Scott* vs. *Waithman*, 3 Stark. R. 168.—*Ridge* vs. *Wilson et al.*, 1 Blackf. 409, note 2.

A suit on a replevin-bond, conditioned to prosecute the action of replevin with effect, and without delay, and to return the goods if a return be awarded, may be sustained, if the plaintiff in the action of replevin do not succeed, though there be no award of a return of the goods.—*Brown* vs. *Parker*, 5 Blackf. 291.

Debt on a replevin bond.—Pleas,

1. *Non damnificatus.*

2. If the plaintiff was injured, it was by his own wrong.

3 & 4. The goods belong to the principal obligor.

5. The principal obligor was ready and willing to prosecute his writ of replevin with effect, but the court, at the instance of the plaintiff, (in the suit on the bond,) dismissed the cause for want of jurisdiction, on the ground of defects, apparent on the face of the affidavit and the writ; that no damages were recovered in the action of replevin, nor was a return of the property awarded.

6. The bond was executed without consideration.

7. The consideration of the bond was illegal.

8. No record of the replevin suit.

9. The same with the 5th.

Held, that these pleas except the 8th were insufficient.—*Sherry et al.* vs. *Foreman et al.*, 6 Blackf. 56.

In suit on a replevin bond, if the plaintiff demur to a plea, and there be judgment against him because his declaration is bad, he may sue again for the same cause of action.—*Ibid.*

An absolute release "of all demands whatever" executed by the plaintiff to the principal obligor of a replevin-bond on which the suit was brought, is a discharge of the bond.—*Thomas* vs. *Wilson et al.*, 6 Blackf. 203.

In a debt on such bond against the principal and surety, the latter let judgment go by default; the former pleaded an absolute release, and, on demurrer to this plea, obtained judgment. *Held*, that the plaintiff could not have damages assessed against the surety.

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the officer, that the property claimed has been disposed of or concealed, so that the order cannot be executed, the court may compel the attendance of the defendant, examine him on oath as to the situation of the property, and punish a wilful obstruction or hindrance of the execution of the order, and a disobedience of the orders of the court in this respect, as in cases of a contempt.

When the property is removed to another county.

SEC. 135. When the property is removed to another county after the commencement of the action, an order may, at any time before judgment, be directed to such county for the seizure and delivery of the property claimed, and several orders to different counties may issue at the same time, at the option of the plaintiff, and the costs shall be taxed as the court may direct; such order to another county shall be served, and the property be delivered to the plaintiff and the order returnable in the same manner, and upon the same terms as above provided.

ARTICLE VIII.

Injunctions and restraining orders.

By what courts granted.

SEC. 136. Restraining orders and injunctions may be granted by the supreme court in term time, when necessary and proper for the due exercise of the jurisdiction and powers of such court, or by any judge thereof in vacation; and by the circuit court and court of common pleas, in their respective counties, in term time, or by the judge thereof in vacation, according to the provisions of this chapter [article.]

Injunctions.

SEC. 137. Where it appears by the complaint, that the plaintiff is entitled to the relief demanded, and the relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation, would produce great injury to the plaintiff; or, when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering some act to be done, in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings, until the further order of the court, which may afterwards be modified, upon motion. And where it appears in the complaint, at the commencement of the action, or during the pendency thereof, by affidavit that the defendant threatens, or is about to remove, or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property.*

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Injunctions—affidavit—notice—bond.

Application to be verified by affidavit.

SEC. 138. In all applications for an injunction, the complaint, or so much thereof as pertains to the acts or proceedings to be enjoined, shall be verified by affidavit. The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment in that proceeding.

Notice.

SEC. 139. No injunction shall be granted until it shall appear to the court or judge granting it, that some one or more of the opposite party concerned, has had reasonable notice of the time and place of making the application; except that, in cases of emergency, to be shown in the complaint, the court may grant a restraining order until notice can be given and hearing thereon.†

SEC. 140. On the hearing of an application for an injunction, each party may read affidavits.

SEC. 141. Upon the granting or continuing an injunction, such terms and conditions may be imposed upon the party obtaining it, as may be deemed equitable.

Bond.

SEC. 142. No injunction or restraining order shall be

*A judgment at law for a part of the purchase money of real estate, was enjoined on the ground that the vendee had been deceived by the vendor as to the title, and had remained ignorant of the defect therein, until after the rendition of the judgment.—*Fitch* vs. *Polke*, 7 Blackf. 564.

A bill in chancery filed to enjoin a judgment at law, on account of fraud in the contract on which the suit was founded, must state that the objection to the contract was not made at law, and must show the omission not to have arisen from any neglect of the complainant.—*Parker* vs. *Morton*, 5 Blackf. 1.

The minor heirs of L. and his administrators obtained a decree, in 1835, against the devisees and mortgagee of D., deceased, by which the administrators were to pay the mortgagee a certain sum of money within a given time,—the latter to release his interest to the devisees in certain land covered by the mortgage—and the devisees, on or before the payment, to convey said land to the heirs, who were in possession. One of the administrators being called on at the expiration of the given time, refused to pay the money to the mortgagee, and the latter then, on receiving a note for it from one of the devisees which was afterwards paid, released to the devisees his interest in the land. In 1837 the devisees brought an action of ejectment against the heirs for the land, and recovered; and the latter, soon afterwards, tendered to the former the money, &c., which was refused. *Held*, that the heirs being all minors, might by a suit in chancery, notwithstanding the land had risen considerably in value, obtain an injunction of the judgment in ejectment, and a conveyance of the land from the devisees, on payment to them of the money, &c.—*Linton et al.* vs. *Potts et. al.*, 5 Blackf. 396.

An injunction may be obtained by a mortgagee to restrain a mortgagor from committing such waste as may render unsafe the mortgage-debt.—*Gray* vs. *Baldwin et al.*, 8 Blackf. 164.

Bill for an injuction to restrain a stranger from taking rails from the owner's land, &c. *Held*, that this being an ordinary trespass, the bill would not lie.—*Cooper* vs. *Hamilton*, 8 Blackf. 377. See also, *Lemon* vs. *Morehead*, 8 Blackf. 561; *Peck et al.* vs. *Van Rensselaer*, 8 Blackf. 312; *Dunn* vs. *Fish et al.*, 8 Blackf. 407; *Hopkins* vs. *Myers et al.*, 8 Blackf. 498.

†When the court has granted an injunction in a case in which the adverse party was entitled to notice, and the transcript does not show whether the notice was given or not, the supreme court will presume it was given.—*Vance et al.* vs. *Workman*, 8 Blackf. 306.

In the case of the Central R. R. Co. vs. The Institution for the Deaf and Dumb, (an unpublished decision,) the Supreme Court of Ind. decided that the facts constituting the emergency alleged in the bill, should be set forth.

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granted until the party asking it shall enter into a written undertaking, with surety, to be approved by the court or judge, to the adverse party affected thereby, for the payment of all damages and costs which may accrue by reason of the injunction or restraining order. *

Second bond not required.

SEC. 143. When an injunction is granted upon the hearing, after a temporary restraining order, the plaintiff shall not be required to enter into a second written undertaking, unless the former shall be deemed insufficient; but the plaintiff and his surety shall remain liable upon the original undertaking.

Writ not necessary.

SEC. 144. It shall not be necessary to issue a writ of injunction, but the clerk shall issue a copy of the order of injunction, duly certified by him, which shall be forthwith served by delivering the same to the adverse party.

Release of errors.

SEC. 145. In applications to stay proceedings after judgment, the plaintiff shall indorse upon his complaint a release of errors in the judgment, whenever required to do so by the judge or court. †

SEC. 146. An order of injunction shall bind every person and officer restrained from the time he is informed thereof.

When adverse party bound.

SEC. 147. When notice of the application for an injunction has been given to the adverse party, it shall not be necessary to serve the order upon him, but he shall be bound by the injunction as soon as the written undertaking required of the plaintiff is executed and delivered to the proper officer.

Money.

SEC. 148. Money collected upon a judgment afterwards enjoined, remaining in the hands of the collecting officer, shall be paid to the clerk of the court granting the injunction, subject to the order of the court.

Attachment for contempt.

SEC. 149. Whenever it shall appear to any court granting an order of injunction, or judge thereof in vacation, by affidavit, that any person has wilfully disobeyed the order, after notice thereof, such court or judge shall award an attachment for contempt against the party charged, or a rule to show cause why it should not issue. The attachment

*Such obligations as injunction-bonds should receive a liberal construction; the intention with which they are executed cannot be mistaken, as they are prescribed by statute for a particular object.—*Conner* vs. *Paxson*, 1 Blackf. 207.

A judgment against B. was enjoined, and the injunction-bond executed by B. with C. as surety. The injunction was afterwards dissolved, and a *fieri facias* taken out on the judgment, and returned "levied on the real estate of B., which remains unsold for want of bidders." Held, that an action would not lie, under these circumstances, against B. and C. on the injunction-bond; the taking of the goods or lands in execution being a bar to a subsequent suit for the same demand, until their insufficiency is proved by a sale and return.—*McIntosh et al.* vs. *Chew et al.*, 1 Blackf. 259.

†A bill in chancery to enjoin a judgment at law, cannot be sustained unless there be a release of errors indorsed on the bill.—*Addleman* vs. *Mormon*, 7 Blackf. 31.

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or rule shall be issued by the clerk of the court, and directed to the sheriff, and shall be served by him.

Service thereof. SEC. 150. The attachment for contempt shall be immediately served by arresting the party charged and bringing him into court, if in session, to be dealt with as in other cases of contempt; and the court shall also take all necessary measures to secure and indemnify the plaintiff against damages in the premises.

Bond. SEC. 151. If the court is not in session, the officer making the arrest shall cause the person to enter into a written undertaking, with surety to be approved by the officer, personally to appear in open court, on the first day of the next term thereof, to answer such contempt, and that he will pay to the plaintiff all his damages and costs occasioned by the breach of the order, and in default thereof he shall be committed to the jail of the county, until he shall enter into such written undertaking with surety, or be otherwise legally discharged.

SEC. 152. Motions to dissolve or modify injunctions may be made in open court, at any time after the adverse party has had reasonable notice.

Damages. SEC. 153. When an injunction to stay proceedings after judgment for debt or damages shall be dissolved, the court shall award such damages, not exceeding ten per cent. on the judgment, as the court may deem right against the party in whose favor the injunction issued.

Damages in case of real estate. SEC. 154. If an injunction to stay proceedings after verdict or judgment in an action for the recovery of real estate, or the possession thereof, be dissolved, the damages assessed against the party obtaining the injunction shall include the reasonable rents and profits of the land recovered, and all waste committed after granting the injunction.

Motion to reinstate order. SEC. 155. Upon an order being made dissolving or modifying an order of injunction, the plaintiff may move the court to reinstate the order, and the court may, in its discretion, allow the motion, and appoint a time for hearing the same before the court, or a time and place for hearing before some judge thereof; and upon the hearing, the parties may produce such additional affidavits or depositions as the court shall direct, and the order of injunction shall be dissolved, modified or reinstated, as the court or judge may deem right. Until the hearing of the motion to reinstate the order of injunction, the order to dissolve or modify it shall be suspended.

ARTICLE IX.

Attachment.

When an attachment may issue. SEC. 156. The plaintiff, at the commencement of an action

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or at any time afterwards, may have an attachment against the property of the defendant, in the cases and in the manner hereinafter stated:*

Where the action is for the recovery of money,

1st. [Where] the defendant, or one of several defendants, is a foreign corporation, or a non-resident of this State;

2d. Where the defendant or one of several defendants, is secretly leaving, or has left the State with intent to defraud his creditors; or

3d. So conceals himself that a summons cannot be served upon him; or

4th. Is removing or about to remove his property subject to execution, or a material part thereof, out of this State, not leaving enough therein to satisfy the plaintiff's claim; or

5th. Has sold, conveyed or otherwise disposed of his property subject to execution, or suffered or permitted it to be sold with the fraudulent intent to cheat, hinder, or delay his creditors; or

6th. Is about to sell, convey or otherwise dispose of his property, subject to execution, with such intent.

When the family remain in the county.

SEC. 157. No attachment, except for the causes mentioned in the fourth, fifth and sixth clauses of the preceding section, shall issue against any debtor while his wife and family remain settled within the county where he usually resided prior to his absence, if he shall not continue absent from the State more than one year after he shall have absented himself, unless an attempt be made to conceal his absence.

Failure to account for deft's. absence.

SEC. 158. If the wife or family of the debtor shall refuse or be unable to give an account of the cause of his absence,

* The joint share of one partner in partnership property, may be taken under a domestic attachment for his individual debt.—*Burgess* vs. *Atkins*, 5 Blackf. 337.

Although the common stock of a firm be taken on an attachment against one of its members as his property, still the undivided interest of the defendant in the property may be sold under the attachment.—*Ibid.*

A writ of foreign attachment was issued under the act of 1807, and, during the pendency of the suit, the act was repealed. There was no clause in the repealing act providing for pending suits. *Held*, that the attachment-suit was at an end upon the taking effect of the repealing act, and that the proceedings in the suit subsequent to such repeal were *coram non judice* and void.—*Stephenson* vs. *Doe d. Wait et al.*, 8 Blackf. 508. See same point decided 5 Blackf. 195, and *Butler* vs. *Palmer*, 1 Hill, 324.

It is no objection to a foreign attachment against A., that the debt on which the writ is founded is evidenced by the joint and several notes of A. and B.—*Leach* vs. *Swann*, 8 Blackf. 68.

The return of the sheriff of one county of an attachment directed to the sheriff of another county, is void.—*Olney* vs. *Sheppard et al.*, 8 Blackf. 146.

An attachment was issued in favor of A. Pending the suit, B. filed in the case an affidavit of a debt, &c., and a bond, &c. The writ was afterwards dismissed as to A. *Held*, that the suit was at an end.—*Ibid.*

The defendant in an attachment, since the act of 1842 to abolish imprisonment for debt, may plead in bar without putting in special bail, unless an affidavit be made, &c.—*State Bank* vs. *Seaman et al.*, 8 Blackf. 281.

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or the place where he may be found, or shall give a false account of either, such refusal, inability or false account shall be deemed an attempt to conceal his absence, within the provisions of this chapter [article.]

Affidavit. SEC. 159. The plaintiff or some person in his behalf, shall make an affidavit showing,

First. The nature of the plaintiff's claim;

Second. That it is just;

Third. The amount which he believes the plaintiff ought to recover;

Fourth. That there exists in the action some one of the grounds for an attachment above enumerated.

Bond. SEC. 160. The plaintiff, or some one in his behalf, shall execute a written undertaking, with sufficient surety, to be approved by the clerk, payable to the defendant, to the effect that the plaintiff will duly prosecute his proceeding in attachment, and will pay all damages which may be sustained by the defendant, if the proceedings of the plaintiff shall be wrongful and oppressive.*

* For the purpose of procuring an attachment, or of filing a claim under it, in favor of a firm, the affidavit may be made by one of the members of the firm.—*Fellows et al.* vs. *Miller et al.*, 8 Blackf. 231.

But if the affidavit purport to be sworn to before a justice in another State, there must be proof that the justice was authorized to administer the oath.—*Ibid.*

See *Andrews et al.* vs. *Reid et al.*, 7 Blackf. 256; *Abbott* vs. *Warriner*, 7 Blackf. 573.

An attachment issued without an oath or affirmation first made and filed according to the statute, cannot be sustained.—*Bond* vs. *Patterson*, 1 Blackf. 34.

If an affidavit against two joint debtors be insufficient as to one of them, it will not authorize an attachment against the property of both.—*Hamilton* vs. *Knight*, 1 Blackf. 25.

In actions commenced by attachment, the record must contain as particular a description of the cause of action as is required in other cases. If, however, this particular description be not inserted in the affidavit or the writ, the omission may be supplied by means of a declaration.—*Harlow* vs. *Becktle*, 1 Blackf. 237. See *Bond* vs. *Patterson*, 1 Blackf. 34; *O'Brien* vs. *Daniel*, 2 Blackf. 290; *Gilly* vs. *Breckenridge*, 2 Blackf. 100.

The affidavit in the case of a domestic attachment, must state the county in which the debtor had recently resided.—*O'Brien* vs. *Daniel*, 2 Blackf. 290.

The affidavit, bond, writ of attachment, and declaration, if there be one, must appear in the record.—*Note 1 to Foyles* vs. *Kelso*, 1 Blackf. 215.

An affidavit for a foreign attachment against the heirs of a judgment-debtor, must state the names of the defendants, and expressly aver them to be non-residents; if the affidavit state the heirs to be "A. and others unknown, who are not all residents in the State of Indiana," it is insufficient.—*Powers* vs. *Hurst*, 3 Blackf. 229.

The affidavit in such case, if no declaration be filed, must show that there is no executor, nor administrator, nor personal assets to discharge the debt.—*Ibid.*

But see *Reed* vs. *The Bank of Kentucky*, 5 Blackf. 227.

The affidavit, bond, writ of attachment, and declaration, if there be one, should be inserted in the record.—See *Cousins* vs. *Brashier*, 1 Blackf. 65, and notes 1 and 2, 1b. The affidavit and bond must be filed before issuing the writ.—*Ibid.*

A writ of attachment ought not to issue for a larger sum than that sworn to, but it may issue for a less sum.—*Reed* vs. *The Bank of Kentucky*, 5 Blackf. 227; *Henrie* vs. *Sweasy*, 5 Blackf. 273.

An affidavit in foreign attachment is not objectionable because the facts contained in it seem to show that the plaintiff is entitled to a larger sum than he claims.—*Henrie* vs. *Sweasy*, 5 Blackf. 273.

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Attachment—order—may be issued to other counties.

Order of attachment.

SEC. 161. Upon the filing of such affidavit and written undertaking in the office of the clerk, he shall issue an order of attachment, which shall be directed and delivered to the sheriff. It shall require him to seize and take into his possession the property of the defendant in his county not exempt from execution.*

Orders may be issued to other counties.

SEC. 162. Orders of attachment may be issued to the sheriff of any other county; and several of them may, at the option of the plaintiff, be issued at the same time or in suc-

The plaintiff in such suit cannot have judgment for a greater sum than he demands by his affidavit, with interest, if the debt be such as to carry interest.—*Ibid.*

On appeal to the circuit court from a justice's judgment in a case of foreign attachment, the parties appeared, and by their agreement, the case was tried by the court. Judgment for the plaintiff. The judgment was objected to in error, because the attachment-bond was defective, and because publication of the pendency of the suit had not been made and proved before the justice had continued the cause. *Held*, that the objections came too late.—*Voorhees & Co.* vs. *Hoagland*, 6 Blackf. 232.

The above-mentioned suit was against several partners, and it was proved on the trial in the circuit court that one of them resided in this State when the suit was commenced. *Held*, that the suit might have been objected to on account of such residence by a plea in abatement; but that it was too late to make the objection after the defendants had appeared to the action, and entered on the trial of the merits.—*Ibid.*

A writ of attachment may issue against partners in the name of the firm.—*Ibid.*

A judgment was obtained in Kentucky against the heirs and administrators of a person who owned real estate here, but who resided and died in Kentucky. The judgment-creditor took out a writ of attachment in this State against the heirs. *Held*, that it was not necessary for the affidavit or declaration in the suit to aver that there were no personal assets in this State. *Held*, also, that it was no objection to the attachment, that it was against the heirs only of the intestate.—*Reed et al.* vs. *The Bank of Kentucky*, 5 Blackf. 227.

See *Summers* vs. *Glancey*, 3 Blackf. 361; also, *Tyner* vs. *Gapin*, 3 Blackf. 370. See sec. 159, p. 64, R. S. vol. 2

*See page 72, sec. 193, R. S. vol. 2.

In foreign attachment under the act of 1838, the bond of the plaintiff, or of the creditors claiming under the attachment, is not objectionable because its penalty exceeds double the amount demanded. *Aliter* if the penalty be less than that amount.—*Fellows et al.* vs. *Miller et al.*, 8 Blackf. 231.

In debt on an attachment bond, breach alleging that the obligee did not owe the debt for which the attachment issued, and that the proceedings were wrongful and oppressive, is insufficient.—*Hoshaw* vs. *Hoshaw et al.* 8 Blackf. 258.

But where the breach, besides said allegation, showed that the attachment plaintiff had obtained judgment, &c., and that the proceedings were *ex parte*, it was held to be sufficient.—*Ibid.*

See note to section 190 of this chapter, page 71.

See *Sumpter* vs. *Wilson et al.*, 1 Carter's Ind. Rep. 144.

If the condition of a bond in domestic attachment recite that the creditor *had* sued out the attachment, &c., parol evidence is not admissible to prove that the bond was executed before the issuing of the writ; but if the writ itself show that it issued *after* the execution of the bond, the recital to the contrary in the condition of the bond will be no ground for quashing the writ. *Summers* vs. *Glancy*, 3 Blackf. 361. See *Love* vs. *Kidwell*, 4 Blackf. 553; *Simpson* vs. *Minor* 1 Blackf. 229.

An attachment bond must be approved of by the clerk who issues the writ. His approval, however, is not conclusive, but only *prima facie* evidence of the sufficiency of the sureties.—*Blaney* vs. *Findley*, 2 Blackf. 338.

If it appears by the recital in the condition of the bond in foreign attachment, that the writ had issued before the bond was filed, and there be nothing in the record to show that the bond had been previously filed, the attachment will be quashed.—*Root et al.* vs. *Monroe* 5 Blackf. 594.

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cession; but the costs only of such as have been executed in whole or in part, shall be recovered against the defendant, unless otherwise directed by the court. The plaintiff shall not have judgment in any such action except in some one of the following cases, viz:

First. When the defendant shall have been personally served with process; or

Second. When property of the defendant shall have been attached in the county where the action is brought; or

Third. When a garnishee shall have been summoned in the county where the action is brought, who shall be found to be indebted to the defendant, or to have property or assets in his hands subject to the attachment.

On Sunday.

SEC. 163. An order of attachment may be issued and executed on Sunday, if the plaintiff will show in his affidavit that the defendant is about to abscond on that day, to the injury of the plaintiff.

Inventory and appraisement.

SEC. 164. The sheriff shall proceed, with the assistance of a disinterested and credible householder of the county, to attach the lands and tenements, goods and chattels of the defendant subject to execution, and shall with the assistance of the householder, make an inventory and appraisment thereof, and return the same with the order.*

Extent of lien.

SEC. 165. An order of attachment binds the defendant's property in the county subject to execution, and becomes a lien thereon from the time of its delivery to the sheriff, in the same manner as an execution.

Personal property to be first taken.

SEC. 166. The defendant's personal property shall be first taken under an attachment; if enough thereof is not found to satisfy the plaintiff's claim, and costs of the action, then his real estate. If, after an order of attachment is placed in the hands of the sheriff, any property of the defendant is removed from the county, the sheriff may pursue and attach the same in any county within three days after the removal.

Property of non-resident heirs, &c.

SEC. 167. The estate, property and interest, descended to non-resident heirs or devisees, or vested in the non-resident executors or administrators of decedents, shall be liable for an attachment for debt, or other demands against the decedent's estate.

Deft. may have property delivered to him how.

SEC. 168. The defendant, or other person having posses-

* The plaintiff in an attachment must prove that the person who assisted the sheriff in making the inventory and appraisement of the property attached, was a householder of the county.—*Leach* vs. *Swain*, 8 Blackf. 68.

Although a writ of attachment be levied on goods which do not belong to the defendant, the plaintiff in attachment, having taken no part in the levy, is not liable for the conduct of the officer who made it.—*Butler et al.* vs. *Borders*, 6 Blackf. 160.

In the case of an attachment against a boat, there can be no sentence against the boat unless the same has been seized by virtue of the writ; and it is only by the officer's return to the writ, that the seizure can be shown.—*Tom Bowling* vs. *Hough*, 5 Blackf. 188.

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sion of property attached, may have the same, or any part thereof, delivered to him, by executing and delivering to the sheriff a written undertaking, with surety to be approved by the sheriff, payable to the plaintiff, to the effect that such property shall be properly kept and taken care of, and shall be delivered to the sheriff on demand, or so much thereof as may be required to be sold on execution to satisfy any judgment which may be recovered against him in the action, or that he will pay the appraised value of the property, not exceeding the amount of the judgment and costs.

Trial of right of property.

SEC. 169. Whenever any person, other than the defendant, shall claim any property attached, the right of property may be tried as in cases of property taken in execution, and the claimant, having notice of the attachment, shall be bound to prosecute his claim as in such cases, or be barred of his right.*

SEC. 170. The defendant, or claimant of any attached property, may be required by the court to attend before it and give information, on oath, respecting the property.

SEC. 171. Goods attached in the hands of a consignee shall be subject to a lien for any debt due him from the consignor.

Bond of def't. to perform the judgment.

SEC. 172. If the defendant, or other person in his behalf, at any time before judgment, shall execute a written undertaking to the plaintiff, with sufficient surety, to be approved by the court, clerk, or sheriff, to the effect that the defendant will appear to the action, and will perform the judgment of the court, the attachment shall be discharged and restitution made of any property taken under it, or the proceeds thereof.

Property of a perishable nature.

SEC. 173. When personal property attached is of a perishable nature, or its keeping expensive, the court may direct the sheriff to sell it at public auction upon reasonable notice. If the property is liable to immediate damage, the sheriff, in vacation, may sell it, by giving ten days' notice, without an order of court, and the proceeds of all sales shall be deposited with the clerk.

Expenses.

SEC. 174. The sheriff shall be allowed by the court the necessary expenses of keeping the attached property, to be paid by the plaintiff and taxed in the costs.

Summons of garnishee.

SEC. 175. If, at the time an order of attachment issues, or at any time before or afterwards, the plaintiff, or other person in his behalf, shall file with the clerk an affidavit that he has good reason to believe that any person (naming him) has property of the defendant of any description in his possession, or under his control, which the sheriff cannot attach by virtue of such order; or that such person is indebted to the defendant, or has the control or agency of any property, moneys, credits or effects; or that the defendant has any

* See title "Property, trial of right of," R. S. vol. 2.

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shares or interest in the stock of any association or corporation; the clerk shall issue a summons notifying such person, corporation, or association, to appear at the ensuing term of the court and answer as garnishee in the action. The summons shall be directed to the sheriff, and served and returned by him in the same manner as a summons is served and returned in other cases. When the summons issues before an attachment, the affidavit must show some one of the causes authorizing the attachment.* /

Liability of garnishee.

SEC. 176. From the day of the service of the summons, the garnishee shall be accountable to the plaintiff in the action for the amount of money, property or credits in his hands, or due and owing from him to the defendant.

Garnishee to furnish sheriff a certificate of property, &c.

SEC. 177. It shall be the duty of any officer or agent of an association or corporation, and of every other person summoned as a garnishee, when served, or within five days afterwards, to furnish the sheriff with a certificate of the number of shares or rights of the defendants in the stock of such corporation or association, or a description of the property held by such corporation, association or person, belonging to or for the benefit of the defendant, or the amount of the debt owing to the defendant by such association, corporation, or person, whether due or not; which certificate shall

* See sec. 156, p. 63, R. S. Vol. II.

A garnishee in foreign attachment, admitted in answer to interrogatories, his indebtedness, by judgment to the defendant in attachment. The court without any motion, and against the plaintiff's will dismissed the proceedings against the garnishee—the attachment still pending. *Held*, that the dismissal was erroneous. *Halbert* vs. *Stinson et al.*, 6 Blackf. 398.

A person indebted by judgment to the defendant in such attachment may be summoned as a garnishee, and be held responsible to the plaintiff in attachment. —*Ibid.*

A summons was served on S. as garnishee in attachment on the 30th of September, 1839, who answered that on the 25th of that month he gave his obligation to the defendant in attachment for a certain sum of money, that he had been informed by a letter from the obligee, dated the 2d of October, 1839, and received a day or two afterwards, that the obligation was assigned to D.; that he had since received notice of its assignment by D. to P. and G.; that the obligation had been presented for payment; and that the assignment to D. was dated the 26th of September, 1839. The plaintiff replied: 1, that the obligation was not *bona fide* assigned to D. before service of the summons on the garnishee; 2, that the garnishee had no notice of the assignment till after he was summoned; 3, that the assignment was without consideration, and made to defraud the plaintiff and other creditors of the obligee. *Held*, that the replications were all bad. *Held*, also, that if the assignment was fraudulent and void as to the obligee's creditors, they might have it set aside by a writ in chancery, and might, until that suit was determined, have the payment of the amount due by the garnishee enjoined.—*Smith* vs. *Wright et al.*, 6 Blackf. 550.

The payee of a promissory note delivered it to his replevin-bail, to indemnify the latter against loss from his engagement; in a writ of attachment afterwards issued against the payee of the note, the maker was summoned as garnishee; and the bail subsequently sold the note without having given notice to the payee to redeem it. *Held*, 1, that the note was pledged, not mortgaged, to the bail; 2, that the sale of the note was void; 3, that the maker was accountable, not to the payee for the use of the purchaser from the bail, but to the plaintiff in attachment, for the amount due on the note.—*Evans* vs. *Darlington*, 5 Blackf. 320.

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be returned by the sheriff with the summons. If such officer, agent, or person refuses to do so, he may be required by the court to attend before it, and be examined on oath concerning the same, and obedience to the orders may be enforced by attachment.

Failure of garnishee.

SEC. 178. Whenever any garnishee, being duly summoned, fails to appear and make discovery as required by law, or fails to answer or demur to the matters set forth against him in the affidavit, or additional complaint or interrogatories, such matters may be taken for confessed, or judgment entered by default, as the case may require; or he may be examined under oath touching all the matters charged in the affidavit, or additional complaint; and all such proceedings, pleadings and process, shall be had, according to the practice in other cases, as shall be necessary to determine the rights of the parties, and render a final judgment.

Absconding garnishee.

SEC. 179. If any plaintiff, or other person in his behalf, shall file with the clerk an affidavit that he fears that the garnishee will abscond before judgment can be had, with intent to defraud the plaintiff, and that he verily believes that the garnishee has moneys, things in action, goods, chattels or effects of said defendant in his possession, or is indebted to said defendant, the clerk shall issue an order of arrest against the garnishee, and hold him to bail thereon as in a civil action.

Final judgm't.

SEC. 180. Final judgment shall not be rendered against a garnishee until the action against the defendant in attachment is determined; and if the plaintiff fails to recover judgment either against the defendant or the garnishee, the garnishee shall be discharged and recover his costs.

Return.

SEC. 181. The return of "no property found" upon the order of attachment, shall not affect the proceedings against the garnishee.

When costs to be paid by deft.; when by garnishee.

SEC. 182. If the plaintiff recover judgment against the defendant, and the garnishee deliver up to the sheriff, before judgment against him, all the defendant's goods and chattels, or other effects in his possession, subject to execution, or an inventory thereof, and pay to the sheriff or into court all moneys due from him, or belonging to the defendant, the costs in the proceeding against the garnishee shall be paid by the defendant; but if the garnishee shall not appear, or if appearing, shall refuse truly to confess the matter alleged, and on the trial the plaintiff shall recover judgment against him, or if he admit that he has moneys, credits or effects belonging to the defendant in his hands, and shall refuse to pay or deliver the same as above provided, he shall pay costs.

SEC. 183. A garnishee in attachment shall not be compelled in any case to pay or perform any contract in any other manner, or at any other time, than he would be bound to do for the defendant in attachment.

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Garnishee—examination of—other claims—discharge.

SEC. 184. A garnishee may pay the money owing to the defendant by him to the sheriff, or into court, and shall be discharged from liability to the defendant for moneys so paid, not exceeding the plaintiff's claim.

Examination of garnishee.

SEC. 185. A garnishee, or officer of a corporation summoned as a garnishee, at any time after being served with the summons five days, may be examined in open court on oath, and if it be discovered on such examination that at the time or after the service of the summons upon him, he or the corporation was possessed of any property of the defendant, or was indebted to him, the court may order the delivery of such property, and the payment of any such indebtedness into court or the execution of a written undertaking by the garnishee, with sufficient sureties, to be approved by the court, payable to the plaintiff, to the effect that the indebtedness shall be paid or the property forthcoming as the court shall direct.

Claims of other creditors.

SEC. 186. Any creditor of the defendant, upon filing his affidavit and written undertaking, as hereinbefore required of the attaching creditor, may, at any time before the final adjustment of the suit, become a party to the action, file his complaint, and prove his claim or demand against the defendant, and may have any person summoned as garnishee or held to bail, who has not before been summoned or held to bail, and propound interrogatories to the garnishee and enforce answers thereto, in like manner as the creditor who is plaintiff. *

SEC. 187. A dismissal of his action or proceedings in attachment by the first attaching creditor, shall not operate as a dismissal of the action or proceedings of any subsequent attaching creditor.

Deft. may move a discharge.

SEC. 188. Any defendant against whom an order of attachment has been issued may, after appearing to the action, move to have the attachment discharged and restitution awarded of any property taken under it; but an appearance to the action shall not operate to discharge the attachment, unless a written undertaking be filed as required in section 172.† If the defendant appear and judgment be rendered in favor of the plaintiff, and any part thereof remain unsatisfied, after exhausting the property attached, such judgment shall be deemed a judgment against the defendant personally, and

* Under proceedings in attachment, each claim stands as an independent suit, and subsequent claims may be filed, when due, though the claim on which the attachment issued be paid, if the attachment is still pending at the time the subsequent claims are filed.—*Ziegenhager* vs. *Doe*, 1 Carter's Ind. Rep. 296.

The attachment lien commences as early as the levying of the writ, as to the claim on which it is issued, and the lien of subsequent claims commences as early as the date when such claims were filed.—*Ibid.*

When a creditor comes in during the pendency of an attachment commenced by another, to obtain a judgment under the statute, his claim must be set forth with the same certainty that, in any other action, is required in a declaration.—*Gilly* vs. *Breckenridge*, 2 Blackf. 100.

† Page 67, R. S. Vol. *II*.

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shall have the same effect as other judgments, and execution shall issue thereon accordingly, for the collection of such residue. If the plaintiff's undertaking be insufficient, he shall have a reasonable time to file an additional one.

Judgment for defendant.

SEC. 189. If the judgment in the action is rendered for the defendant, the attachment shall be discharged, and the property attached, or its proceeds, returned to him.

Judgment for plaintiff.

SEC. 190. If judgment in the action be rendered for the plaintiff, or one or more of several plaintiffs, and sufficient proof be made of the goods, chattles, rights, credits, moneys and effects in the possession of the garnishee, the court shall also give judgment in favor of the plaintiff or creditors against the garnishee, or the property of the defendant, or both, as the case may require, which may be enforced by execution.*

SEC. 191. After judgment for the plaintiff, or one or more of several plaintiffs, property attached and remaining unsold may be sold on execution, as in other cases.

Money to be paid *pro rata* to creditors.

SEC. 192. The money realized from the attachment and the garnishees shall, under the direction of the court, after paying all costs and expenses, be paid to the several creditors, in proportion to the amount of their several claims as adjusted, and the surplus, if any, shall be paid to the defendant.

* If, in an attachment against a boat for debt, the boat be released by the giving of a bond, as prescribed by statue, the judgment should be rendered *in personam* against the master, owner or consignee, who causes himself to be substituted as defendant.—*Braylon et al. vs. Freese*, 1 Carter's Ind. Rep. 121.

The bond given in such case stands as collateral security, and is similar in most respects to an appeal bond.—*Ibid.*

A judgment in attachment, notwithstanding it appears that the debt attached in the hands of the garnishee was not due when the judgment was rendered against him, or that the affidavit does not state of what county the attachment defendant was late resident, is valid until reversed.—*Cornwell vs. Hungate*, 1 Carter's Ind. Rep. 156.

If the defendant in attachment do not appear and put in bail, a judgment against him may be good, without his having been previously called, and his default entered.—*Harlow vs. Becktle*, 1 Blackf. 237.

Upon a judgment in attachment, the usual order of the court is, that so much of the property attached be sold as will satisfy the judgment; but an order for the sale of all the property is not erroneous, unless it be apparent to the court making it that injustice would be done.—*Ibid.*

In the process by attachment, the proceedings are against the property only of the defendant, and where execution is awarded, it issues against the property attached, and nothing else. If it pays the debt, it is well; if not, the original debt, so far as it remains unpaid, continues.—*Henrie vs. Swasey*, 5 Blackf. 335.

The judgment in such case, if the defendant did not appear, cannot be made the foundation of a suit.—*Ibid.*

In cases of attachment it must be proved previously to the rendition of the judgment against the defendant, that he had had notice by advertisement of the pendency of the attachment, according to the statute; and the record must either state that satisfactory evidence of such notice was given to the court, or it must contain the evidence itself.—*Foyles vs. Kelso*, 1 Blackf. 215.

If, in an attachment against a boat, for materials, &c., the boat be released by the giving of a bond as prescribed by statute, the judgment for the plaintiff should be against the debtor personally.—*Jones et al. vs. Grisham*, 6 Blackf. 291.

But if no bond be given in such case, the judgment for the plaintiff should be for a sale of the boat.—*Ibid.*

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Action on bond.

SEC. 193. Every defendant shall be entitled to an action on the written undertaking of the plaintiff or creditor, by whose proceedings in attachment he shall have been aggrieved, if it shall appear that the proceedings were wrongful and oppressive, and he shall recover damages at the discretion of the jury.*

Actions for the State.

SEC. 194. In all actions in the name of the State of Indiana, or of any person, agent, or officer, for the use of the State, if process be returned that any defendant is not found, an order of attachment may be issued and proceedings had in like manner, as in other cases, without filing any affidavit or written undertaking.

Return.

SEC. 195. When an order of attachment is fully executed or discharged, the sheriff shall return the same, with his proceedings thereon, to the court.

Proceedings before justices of the peace.

SEC. 196. Attachments against the goods and chattels, rights, credits, moneys and effects of defendants, may be issued in cases contemplated in the foregoing provisions upon any claim within the jurisdiction of a justice of the peace, upon filing with the justice an affidavit,† as prescribed in this chapter [article.] And the justice shall perform the duties required of the [court and clerk thereof; and the constable shall perform the duties required of the] sheriff in the above provisions. The constable shall return the order of attachment within ten days, with his doings thereon; and in case where a summons has not been served and property has been attached, the justice shall give three weeks' notice of the attachment, in some public newspaper, published in the county, if any is published therein; if not, then by posting up written notice thereof in three of the most public places in the township, and fix the day of trial at the expiration of such notice.

Trial, and time thereof.

SEC. 197. If the defendant does not appear and give bond for the release of the property attached, before the day of trial, the justice shall proceed to hear and determine the cause, and in case judgment is given against the defendant, he shall order the property to be sold to satisfy the judgment, according to the provisions of this chapter [article.]

Garnishees.

SEC. 198. Garnishees may be summoned, and the same proceedings had before the justice as provided in the higher courts.

*See notes to sec. 161, p. 65, R. S. vol. 2.

† The appellants procured a writ of attachment to be issued by a justice of the peace, commanding the constable to summon the master of, and attach the appellee's boat. The cause of action before the justice was in tort, and the amount claimed was 100 dollars. Held, that the justice had no jurisdiction for that amount, and therefore, the process under which the boat was attached was illegal and void.—*White Water Valley Canal Co.* vs. *Dow*, 1 Carter's Ind. Rep. 141.

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Receivers—when appointed—oath and bond—disposition of money.

ARTICLE X.

Receivers and Deposits in Courts.

In what cases a receiver may be appointed.

SEC. 199. A receiver may be appointed by the court in the following cases:

First. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor, to subject any property or fund to his claim.

Second. In actions between partners or other persons jointly interested in any property or fund.

Third. In all actions when it is shown that the property, fund or rent and profits in controversy is in danger of being lost, removed or materially injured.

Fourth. In actions by a mortgagee for the foreclosure of a mortgage, and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed or materially injured; or, when such property is insufficient to discharge the mortgage debt, to secure the application of the rents and profits accruing before a sale can be had.

Fifth. When a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

Sixth. And in such other cases as may be provided by law; or when, in the discretion of the court, it may be necessary to secure ample justice to the parties.

SEC. 200. No party or attorney, or other person interested in an action, shall be appointed receiver therein.

Oath and bond.

SEC. 201. Before entering upon his duties, the receiver must be sworn to perform them faithfully, and with one or more sureties, approved by the court, execute a written undertaking payable to such person as the court shall direct, to the effect that he will faithfully discharge the duties of receiver in the action, and obey the orders of the court therein.

When money, &c., is subject of litigation, how disposed of.

SEC. 202. When it is admitted by the pleading or examination of a party, that he has in his possession or under his control, any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such party, with or without security, subject to the further direction of the court.

When the order of court is disobeyed.

SEC. 203. Whenever, in the exercise of its authority, a court shall have ordered the deposit or delivery of money, or other thing, and the order is disobeyed, the court, besides punishing the disobedience, as for contempt, may make an order requiring the sheriff to take the money or thing, and

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deposit or deliver it in conformity with the directions of the court.

SEC. 204. Money deposited or paid into court in an action, shall not be loaned out, unless with the consent of all the parties having an interest in, or making claim to the same.

Powers of receivers.

SEC. 205. The receiver shall have power, under the control of the court, to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, and generally to do such acts respecting the property as the court may authorize.

SEC. 206. When the answer of the defendant admits part of the plaintiff's claim to be just, the court, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order by execution or attachment.

ARTICLE XI.

Change of Venue.

For what cause change granted.

SEC. 207. The court in term, or the judge in vacation, may change the venue of any civil action upon the application of either party, made upon affidavit, showing one or more of the following causes:

First. That the judge has been engaged as counsel in the cause, prior to his election or appointment as judge, or is otherwise interested in the cause; or,

Second. That the judge is of kin to either party; or,

Third. That the opposite party has an undue influence over the citizens of the county, or that an odium attaches to the applicant, or to his cause of action or defense, on account of local prejudices; or,

Fourth. Where the county is a party to the suit; or,

Fifth. That the convenience of witnesses and the ends of justice would be promoted by the change.

Duties of clerk; costs, &c.

SEC. 208. When a change of venue is directed, the clerk of the court in which the suit is pending, shall forthwith transmit the papers, and a transcript of the proceedings, to the clerk of the court to which the venue is changed,—the party applying for the change first paying the costs thereof. And the clerk of the proper court shall receive the papers and transcript, giving a receipt therefor, and docket the action in its order among the other causes of the court; and the action shall stand for trial at the first term, and shall be tried in the same manner as if the cause had originated in that court.*

* The application of one who is not a party to the suit, for a change of venue, need not be sustained.—*Sherry et al.* vs. *Denn d. The State Bank*, 8 Blackf. 542.

When a change of venue is awarded in open court, an entry on the record

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Statute of limitations.

SEC. 209. No change of venue shall be granted in vacation, unless the opposite party has had ten days' notice.

ARTICLE XII.

Limitation of Civil Actions.

SEC. 210. The following actions shall be commenced within six years after the cause of action has accrued, and not afterwards: Six years.

First. On accounts and contracts not in writing.

Second. For use, rents, and profits of real property.

Third. For injuries to property, damages for any detention thereof, and for recovering the possession of personal property.

Fourth. For relief against frauds.

SEC. 211. The following actions shall be commenced within the periods herein prescribed after the cause of action has accrued, and not afterwards:

First. For injuries to person or character, and for a forfeiture or penalty given by statute—within two years. Two years.

Second. All actions against a sheriff or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty,—within three years; but an action may be brought against the officer or his legal representatives, for money collected in an official capacity and not paid over, at any time within six years. Three years. Six years.

Third. For the recovery of real property sold on execution, brought by the execution-debtor, his heirs, or any person claiming under him, by title acquired after the date of the judgment,—within ten years after the sale. Ten years.

Fourth. For the recovery of real property sold by executors, administrators, guardians or commissioners of a court, upon a judgment specially directing the sale of property sought to be recovered, brought by a party to the judgment, his heirs, or any person claiming a title under a party, acquired Five years.

directing the change, and ordering the clerk to transmit the papers, is a substantial compliance with the statute.—*Chapman* vs. *Woods*, 6 Blackf. 504.

If, after the venue in a case is changed, the defendant plead to the action, he cannot object to the order changing the same.—*Burnham* vs. *Hatfie d*, 5 Blackf. 21.

See *Rubottom et al.* vs. *Shank*, 5 Blackf. 122.

The circumstance of the record not showing an order for a change of venue, cannot be assigned for error, if no objection be made in the court below to the jurisdiction of the court to which the change is taken.—*Bosley* vs. *Farquar et al.*, 2 Blackf. 61.

Expressions of prejudice and the use of harsh and violent terms derogatory to a party's character for honesty by a judge, are not sufficient cause for a change of venue to another circuit.—*Milison* vs. *Holmes et al.*, 1 Carter's Ind. Rep. 45. A party cannot repeat an application for a change of venue without some very special cause.—*Ibid.*

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after the date of the judgment—within five years after the sale is confirmed.

Twenty years. *Fifth.* Upon contracts in writing, judgments of a court of record, and for the recovery of the possession of real estate—within twenty years. *

Fifteen years. SEC. 212. All actions not limited by any other statute shall be brought within fifteen years. In special cases, where a different limitation is prescribed by statute, the provisions of this chapter [article] shall not apply.

Mutual accounts. SEC. 213. In an action brought to recover a balance due upon a mutual, open, and current account between the parties, the cause of action shall be deemed to have accrued from the date of the last item proved in the account on either side.†

* The statute of limitations is constitutional: it has no reference to the validity of contracts, but only prescribes the time within which they may be enforced, and after that withholds the remedy.—*Blackford et al.* vs. *Peltier*, 1 Blackf. 36.

Technical and continuing trusts, not cognizable at law, are not barred by the statute of limitations.—*Raymond et al.* vs. *Simonson*, 4 Blackf. 77.

The statute of limitations forms no part of the contract; it affects the remedy only, and that statute governs which happens to be in force when suit is brought. —*Winston* vs. *McCormick*, 1 Carter's Ind. Rep. 56.

If the time limited by statute for commencing a suit expire whilst the statute is in force, and before the suit is brought, the right to bring the suit is barred; and no subsequent statute can rescind the right.—*McKinney* vs. *Springer*, 8 Blackf. 506.

The words "beyond the seas," in the statute of limitations of 1831 meant, previously to the act of 1843 on the subject, beyond the limits of the State; and the last named act did not, as to suits pending at its passage, affect the meaning of said words in the statute of 1831.—*Stephenson* vs. *Doe d. Wait et al.*, 8 Blackf. 508.

If in trover there have been a demand and refusal within six years before the bringing of the suit, and there be no other evidence of conversion than demand and refusal, the statute of limitations will not bar the action—*Collis* vs. *Bowen et ux.*, 8 Blackf. 262.

As to the statute of limitations in matters of equity under the statute of 1843, see *Gullet et al.* vs. *Housh*, 5 Blackf 52; *Smith* vs. *Calloway*, 5 Blackf. 86.

When a request is essential to the maintenance of a suit for the non-performance of a trust or duty, the statute of limitations does not begin to run until the request has been made.—*Raymond et al.* vs. *Simonson*, 4 Blackf 77.

The statute of limitations, in an action against an agent or factor, for not accounting, does not begin to run until a demand has been made.—*Judah* vs. *Dyott*, 3 Blackf. 324. See, also, *Judah* vs. *Brandon*, 5 Blackf. 506.

† Where all the items of an account are on one side, the circumstance of some of them being within five years does not take the others of longer standing out of the statute of limitations *Aliter*, where there are mutual accounts between the parties.—*Buntin* vs. *Lagow et al.*, 1 Blackf. 373.

The terms "running accounts," in the statute of 1838, mean mutual and reciprocal demands between the parties which remain open and unsettled; and when the accounts and demands which occasion the suit are of that description, and are between merchant and merchant, they are not limited by the statute.—*Rrackenridge* vs. *Buttsell* 1 Carter's Ind. Rep. 333.

In 1804, the father of B. and C. delivered to B, in England, £75, with directions to pay the same to C. on the latter's arrival in America. In 1818, C. came to America where B. was then resident, and accounts on both sides immediately commenced between them, and continued running until 1826. The £75 were charged in the account of C. against B. Held, that these mutual accounts, including the £75, were not within the statute of limitations; some of the items having been furnished within five years before the commencement of the suit.—*Knipe* vs. *Knipe*, 2 Blackf. 340.

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Limitation—set-off—two years after disability—non-resident—death.

Set-off.

SEC. 214. A party to any action may plead or reply a set-off or payment to the amount of any cause of action or defense, notwithstanding such set-off or payment is barred by the statute.*

Two years after disability.

SEC. 215. Any person being under legal disabilities when the cause of action accrues, may bring his action within two years after the disability is removed.†

Non resident.

SEC. 216. The time during which the defendant is a non-resident of the State, or absent on public business shall not be computed in any of the periods of limitation. But when a cause has been fully barred by the laws of the place where the defendant resided, such bar shall be the same defense here as though it had arisen within this State.

Eighteen months after death.

SEC. 217. If any person entitled to bring, or liable to any action, shall die before the expiration of the time limited for the action, the cause of action shall survive to or against his representatives, and may be brought at any time, after the expiration of the time limited within eighteen months after the death of such person.

When a new action may be brought.

SEC. 218. If after the commencement of an action, the plaintiff fail therein, from any cause except negligence in the prosecution, or the action abate or be defeated by the death of a party, or judgment be arrested or reversed on appeal, a new action may be brought within five years after such determination, and be deemed a continuation of the first, for the purposes herein contemplated.

Concealment.

SEC. 219. If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the

* Matter pleaded as a set-off is not, to the amount of the plaintiff's demand, barred by the statute of limitations; but to so much of the set-off as exceeds the plaintiff's demand, the statute is a bar.—*Livingood* vs. *Livingood et al*, 6 Blackf. 268.

To a suit commenced in October, 1840, on a single bill dated the first of November, 1833, and payable six years and nine months after date, the defendant pleaded payment and set-off. The plaintiff replied that the matter of set-off did not accrue within five years next before the first of November, 1833. The replication was insufficient.—*Ibid.*

The statute of 1835 relative to limitations, has relation only to debts when pleaded in defence of a suit by way of a set-off.—*Judah* vs. *Brandon*, 5 Blackf. 506.

† It is no answer to a plea of the statute of limitations to a writ of error, that, within five years next after one of the plaintiffs had arrived at full age, the writ was prosecuted.—*Shannon et al.* vs. *Dunn et al.*, 8 Blackf. 182.

That one of two plaintiffs in error is under a disability, is no answer to a plea of the statute of limitations to a writ of error—*Hottle et ux.* vs. *Kindle et al.*, 8 Blackf. 295.

The administrator of a guardian was sued in chancery by the administrator of the ward, for money received by the guardian from the administrator of the ward's father, as part of the ward's distributive share of his father's estate; and it appeared that the guardian had given receipts for the money thus obtained. Held, that the demand was not barred by the statute of limitations—*Raymond et al.* vs *Simonson*, 4 Blackf. 77.

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action may be commenced at any time within the period of limitation, after the discovery of the cause of action.*

New promise to be in writing.

SEC. 220. No acknowledgment or promise shall be evidence of a new or continuing contract whereby to take the case out of the operations of the provisions of this chapter [article], unless the same be contained in some writing, signed by the party to be charged thereby.†

Promise of one joint contractor, &c.

SEC. 221. The acknowledgment or promise of one joint contractor, or executor, or administrator, shall not render any other joint contractor, executor, or administrator, liable under the provisions of this chapter [article.]

In case of several defendants.

SEC. 222. In actions against two or more defendants, where the plaintiff is barred by the provisions of this chapter [article] as to one or more of the defendants, and is entitled to recover against others for any cause, judgment shall be rendered against those liable, and for those not liable.

Endorsement of payment not sufficient.

SEC. 223. Nothing contained in the preceding sections shall take away or lessen the effect of any payment made by any person; but no indorsement, or memorandum of any payment made upon any instrument of writing, by or on behalf of the party to whom the payment shall purport to be made, shall be deemed sufficient to exempt the case from the provisions of this chapter [article.]

SEC. 224. Limitation of actions shall bar the State of Indiana and the United States as other persons.

Judgments and decrees.

SEC. 225. Every judgment and decree of any court of record of the United States, or of this or any other State, shall be deemed satisfied after the expiration of twenty years.

* In cases of fraud the statute of limitations does not begin to run until the fraud is discovered.—*Raymond et al.* vs. *Simonson*, 4 Blackf. 77.

† At the foot of an account containing several items, there was the following acknowledgment: "I acknowledge the above account to be just. *Tho. Neighbors.*" Held, that this acknowledgment was a written contract, which, under the act of assembly, was not barred by the statute of limitations.—*Neighbors* vs. *Simmons*, 2 Blackf. 75.

A person to whom an account of five year's standing was presented, did not object to the account, but said he thought he paid it, and had the receipt at home. Held, that this was not sufficient to take the case out of the statute of limitations.—*Conwell* vs. *Buchanan*, 7 Blackf. 527.

The acknowledgment of a debt to take a case out of the statute of limitations, should contain an unqualified admission of a subsisting debt, which the party was then willing to pay.—*Goldsby et al.* vs. *Gentle*, 5 Blackf. 436.

The following acknowledgment, "the plaintiff might have been paid long ago, if he had not treated me badly," is not sufficient to take the case out of the statute.—*Ibid.*

The payee of a note sold it before it was due, affirming the maker to be solvent; and the purchaser afterwards sued the seller in assumpsit, in consequence of the maker's insolvency, to recover back the money paid for the note. Held, that if five years had elapsed from the time the note became due, before the commencement of the suit, the statute of limitations might be pleaded.—*Hoyt* vs. *Reid et al.*, 3 Blackf. 368.

An acknowledgment of a debt, made by one partner after a dissolution of the partnership, is not sufficient to take the case out of the statute of limitations as to the other partner.—*Yandes et al.* vs. *Lefavour et al.*, 2 Blackf. 371.

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Limitation—joint debtor—husband and wife—witnesses—summons.

When part of the plaintiffs are barred.

SEC. 226. In cases where part only of the persons entitled to bring an action, are barred by the statute of limitations, all may be joined as plaintiffs; and when it shall appear to the satisfaction of the court, by admission or otherwise, that part of the plaintiffs are barred by the statute, the court, upon motion, shall order the names of such plaintiffs to be struck from the record, and the action may be prosecuted by those not barred.

When joint debtor liable.

SEC. 227. Neither a joint debtor or his representatives, in whose favor the statute of limitations has operated, shall be liable to a joint debtor, or surety, or their representatives upon payment by such joint debtor or surety, or their representatives, of the debt or any part of it.

Husband and wife.

SEC. 228. The statute of limitations shall in no case bar the right of the husband to join with, and sue for the use of the wife, at any time during coverture, in any action which would survive to her after the removal of her disability.

ARTICLE XIII.

Witnesses.

Summons for witnesses.

SEC. 229. The clerk of the proper court shall issue a summons for witnesses, upon the application of any party to the action. The summons may be served by the party or any other person, or by the sheriff. The party or any other person than the sheriff, shall not be entitled to fees for the service. When a summons is served by the sheriff, his return is proof of the service; when served by any other person, the service must be shown by affidavit.

By whom issued and tested.

SEC. 230. The summons shall be issued and attested by the clerk without seal, and one summons shall include all the witnesses required at the same time, residing in the same county.

More than three witnesses, &c.

SEC. 231. If any party summon more than three witnesses to prove the same fact, he shall pay the costs occasioned by the additional number of witnesses.*

Fees, when need not be tendered.

SEC. 232. Witnesses residing in the county where the court is held shall be compelled to attend in obedience to the summons, without payment or tender of fees being first made.

Fees, when to be tendered.

SEC. 233. A witness shall not be obliged to attend before a court or judge out of the county where he resides, unless his legal fees for traveling to and from the court, and one

* The provisions of section 248, chapter 40, R. S. of 1843, that if either party should call more than three witnesses to prove the same identical fact, such party shall pay the costs occasioned by such additional number, is general, and applies where witnesses are called to impeach the credibility of other witnesses.—*Davis* vs. *Melvin et al.*, 1 Carter's Ind. Rep. 136.

A witness is not liable to a suit for evidence given by him in a cause.—*Grove* vs. *Brandenburgh*, 7 Blackf. 234.

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day's attendance are paid or tendered before or at the time of the service of the summons.

Attachment. SEC. 234. The attendance of all witnesses when duly summoned, and to whom fees have been paid or tendered, in cases required by law, may be enforced by attachment.

Fees in advance—when. SEC. 235. At the commencement of each day after the first day, a witness attending a trial out of the county in which he resides shall be entitled to demand and receive the legal fees for that day in advance. If not thus paid, he is not compelled to attend or remain as a witness.

Oath. SEC. 236. Before testifying, every witness shall be sworn to testify the truth, the whole truth, and nothing but the truth. The mode of administering an oath shall be such as may be most consistent with, and binding upon the conscience of the person to whom the oath may be administered. The forms heretofore observed shall be hereafter observed.

Interpreters. SEC. 237. Interpreters may be sworn to interpret truly whenever necessary.

Crime and interest. SEC. 238. No person offered as a witness shall be excluded from giving evidence either in person or by deposition in any judicial proceeding, by reason of incapacity from crime or interest. But this section shall not render competent a party to an action, or the person for whose use it is brought, or the husband or wife of any such party.*

* When in an action of trover against the defendants, one of them pleads, and the other suffers judgment by default, the latter is a competent witness, under the code of procedure, (similar to that of Indiana,) for the plaintiff against his co-defendant.—*Thompson* vs. *Blanchard*, 4 Comstock's N. Y. Rep. 303.

The rule contained in many of the following decisions, under this section, is changed by sec. 238. But *quære*, does not sec. 243, p. 83, make the objections go to the credibility of the witness?

One of two defendants to an action on contract, who has suffered judgment by default, is a competent witness for the plaintiff in the same action, unless he is interested in favor of the plaintiff.—*Kincaid* vs. *Purcell*, 1 Carter's Ind. Rep. 324.

One of several makers of a promissory note who had become a certified bankrupt, is not a competent witness for the other makers in a suit upon the note brought by the payee, without having previously released to his assignee all claims of surplus and allowance.—*Madison Ins. Co.* vs. *Mitchell*, 1 Carter's Ind. Rep. 384.

A person is competent as a witness when, in the event of the success of the party against whom he is called, he would be liable to a less amount than he otherwise would if the party who called him should succeed.—*Elliott* vs. *Lewallan*, 1 Carter's Ind. Rep. 534.

If a witness be objected to as incompetent, the cause of the incompetency must appear to have been pointed out to the circuit court, or the overruling the objection cannot be assigned for error.—1 Carter's Ind. Rep. 141.

Agents are generally competent witnesses; they are so in many cases, *ex necessitate*, though they may be interested.—*The State* vs. *Holloway et al.*, 8 Blackf. 45.

The party objecting to the admission of a witness must show his incompetency.—*Ibid.*

In a suit on a justice's bond, the breach assigned was the justice's failure to pay over money collected on a judgment. Held, that the judgment debtor was not a competent witness to prove his payment of the money to the justice.—*Parker et al.* vs. *The State*, 7 Blackf. 292.

To render a bankrupt competent as a witness to increase the assets in the

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Witnesses—incompetency.

SEC. 239. Children under ten years of age are presumed to be incompetent witnesses; when over the age of ten years they are presumed to be competent. Persons of unsound mind at the time of being produced, are incompetent; but the court may examine children of tender age and persons. Incompetency.

hands of his assignee, it must appear not only that he had no claim to a surplus of his estate, but also that he had received his allowance—*Oldham et al.* vs. *McCormick*, 8 Blackf. 387.

In debt against a constable for an escape on execution, the execution debtor is a competent witness for the constable.—*Bond* vs. *Brady*, 7 Blackf. 39.

In debt against a constable on his official bond for a false return of a *fieri facias*, the execution-defendant cannot be objected to as a witness for the plaintiff on the ground of his being interested.—*Limpus* vs. *The State*, 7 Blackf. 43.

A. executed a bond for the delivery of goods taken on an execution against B., which were afterwards on A.'s claim, adjudged to be his, and were therefore, not delivered according to the condition of the bond. *Held*, that in a suit by C. against the officer for a false return of the execution, A.'s execution of the delivery bond, (he having been discharged from it by said adjudication,) did not render him incompetent as a witness for either party.—*Ibid.*

A person for whose use a suit is brought being liable, by statute, for costs if the suit fail, is not a competent witness for the plaintiff.—*Ellison et al.* vs. *Johnson*, 7 Blackf. 217.

Nor can he be rendered competent in such case by his release of his interest in the cause of action to the plaintiff.—*Ibid.*

See *Cully* vs. *Ross*, 7 Blackf. 312.

The circumstance that a person has executed an appeal bond in the name of the plaintiff, and as his attorney in fact, in the case of an appeal from a justice's judgment, does not render him incompetent as a witness for the plaintiff, on the trial of the cause in the circuit court.—*Bradbury* vs. *Dougherty*, 7 Blackf. 467.

The defendant cannot introduce a witness to prove facts which, if true, would show that the witness, and not the plaintiff, was entitled to the subject matter of the suit.—*Jacobs* vs. *Finkel*, 7 Blackf. 432.

If a witness be competent to answer any questions in a cause he ought not to be rejected generally.—*Prather et al.* vs. *Lentz*, 6 Blackf. 244.

See *Jenners* vs. *Oldham*, 6 Blackf. 235; *Henderson* vs. *Reeves*, 6 Blackf. 101.

If, in trespass against two defendants, one of them be separately tried and acquitted, the other may afterwards, on his trial, examine the acquitted defendant as a witness.—*Carpenter* vs. *Crane et al.*, 5 Blackf. 119.

See *The State* vs. *Lockwood*, 5 Blackf. 144.

See *Noe* vs. *Higdon*, 4 Blackf. 184.

If the attesting witness to a bond reside in another state, the bond will be received in evidence, upon proof of their hand writing.—*Jones* vs. *Cooprider*, 1 Blackf. 47.

One of two subscribing witnesses to a bond being called to prove its execution, denied his signature. *Held*, that the other, if he could be procured, should be examined, but if he could not be found, secondary evidence might be resorted to.—*Booker* vs. *Bowles*, 2 Blackf. 90.

If a subscribing witness deny his signature, the case stands in the same situation as if his name were not on the instrument.—*Ibid.*

A deed with subscribing witnesses is not admissible in evidence on proof of the grantor's hand-writing, unless the absence of the witnesses is accounted for, and due diligence have been used without effect, to procure proof of their hand-writing. *Bowser et al.* vs. *Warren*, 4 Blackf. 522.

A witness on his cross-examination declared he was not interested. *Held*, that his interest might be afterwards proved by other testimony.—*Ibid.*

If a witness be objected to as interested, and his interest be proved by other witnesses, the party calling the witnesses has no right to examine him on his *voire dire*; that right belonging alone to the party who makes the objection.—*Wright* vs. *Matthews*, 2 Blackf. 187.

No confession of interest made by a witness after a party is entitled to his testimony, can render him incompetent.—*Sims* vs. *Gibson*, 2 Blackf. 461.

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of alleged unsound mind as to their capacity, and decide upon their competency.*

Husband and wife.

SEC. 240. Husband and wife are incompetent witnesses for or against each other, and they cannot disclose any communication from one to the other, made during the existence of the marriage relation, whether called as a witness while that relation exists or afterwards.

Confidential communications.

SEC. 241. No attorney, physician, surgeon, clergyman, or priest, shall be allowed, in giving testimony, to disclose any

To exclude a witness on the ground of interest, he must appear to be interested in favor of the party who calls him.—*Ibid.*

The surety for costs in a suit before a justice of the peace is not a competent witness for the plaintiff, on the trial of the cause on appeal.—*Craven* vs. *Updyke*, 3 Blackf. 272.

The maker of a promissory note is a competent witness for the plaintiff, in an action by the assignee against the assignor, involving the validity of the consideration of the note.—*Fosdick* vs. *Starbuck*, 4 Blackf. 417.

If the payee of a note assign it, and the assignee sue the maker, the plaintiff, having released to the payee, may exemine him as a witness, to prove the execution of the note.—*Matheny* vs. *Westfall*, 4 Blackf. 491.

An agent is generally admitted as a witness, from necessity, to prove his delivery of goods, or payment of money, for his principal.—*Doe* vs. *Himelick*, 4 Blackf. 494.

An administrator who is defendant in an action, is not a competent witness against the plaintiff.—*Sinks* vs. *English*, 3 Blackf. 138.

In an action by a road commissioner on a bond, his predecessor to whom the bond was given not being interested, is a competent witness for the plaintiff.—*Cox* vs. *Way*, 3 Blackf. 143.

In a suit against husband and wife for a debt due by the wife, *dum sola*, the plaintiff cannot prove admissions made by the wife, after her marriage, respecting the debt.—*Brown* vs. *Lasselle*, 6 Blackf. 147.

The admissions of a party may be given in evidence against him.—*Carter* vs. *Buckner*, 3 Blackf. 314.

The admissions made by a party, examined under oath on a trial before a justice, cannot be proved in a circuit court, on appeal,—the party being in court on the trial of the appeal, and not there examined.—*Ibid.*

It is the general rule that the best evidence must be given of which the nature of the case is capable.—*Jackson* vs. *Cullum*, 2 Blackf. 228.

If any instrument of writing, or even the record of a judgment, be lost or destroyed, the contents may be proved by parol evidence.—*Ibid.*

The rule of law, that the best evidence which the nature of the case admits of must be produced, applies as well to secondary as to primary evidence.—*Coman* vs. *The State*, 4 Blackf. 241.

The oath of one of several plaintiffs to the loss of an instrument of writing is sufficient to let in secondary evidence of its contents.—*Harris* vs. *Doe*, 4 Blackf. 369.

Neither hearsay nor irrelevant testimony is admissible.—*Wilson* vs. *Harding*, 2 Blackf. 241.

*A person in a state of intoxication, at common law, could not be admitted as a witness.—15 Serg. & Rawle, 235.

It is no objection to the competency or credibility of a witness that he is subject to fits of derangement, if at the time of giving his testimony he is sane.—*Evans* vs. *Eaton*, 6 Wheaton, 356; 5 Cond. Rep. 302.

The presumption is in favor of mental capacity; and, in order to affect the validity of a deed or will, incapacity must be proved. If a general derangement of the grantor be proved to have existed at any time prior to the execution of the deed, the grantee must prove capacity in the grantor at the time the deed was executed.—*Lessee of Hoge* vs. *Fisher*, Peters' C. C. Rep. 163.

Debt against the administratrix of A., on a bond alleged to have been executed by A., B. and C., jointly and severally. Plea, *non est factum*. The defendant

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communication entrusted to him in his professional capacity, and necessary, and proper to enable him to discharge the duties of his profession, according to the usual course of practice or discipline, unless with the consent of the party in whose favor the foregoing provisions are enacted.

Religious belief.

SEC. 242. No want of belief of a Supreme Being, or in the christian religion, shall render a witness incompetent. But the want of such religious belief may be shown upon the trial. In all questions affecting the credibility of a witness his general moral character may be given in evidence. *

SEC. 243. Any fact which might heretofore be shown to render a witness incompetent, may be hereafter shown to affect his credibility.

The party producing, when may impeach.

SEC. 244. The party producing a witness, shall not be allowed to impeach his credit by evidence of bad character, unless it was indispensable that the party should produce him, or in case of manifest surprise, when the party shall have this right; but he may in all cases contradict him by other evidence, and by showing that he has made statements different from his present testimony.†

offered to prove "that C. had great influence over A.; that he had directed his distillers to let A. have as much whiskey as he wanted; and that he, C., could lead A. like a child." *Held*, that the evidence was inadmissible.—*Jenners* vs. *Howard*, 6 Blackf. 240.

In the case of *Mann et al.* vs. *Clifton*, 3 Blackf. 304, where one of the parties contended that a new trial ought to have been granted on the ground that one of his material witnesses, when called to the stand, was intoxicated, which statement was supported by the party's affidavit, the court *held*, that the affidavit of the witness himself ought to have been produced, it being the best evidence in the case; and that it was the duty of the party, as soon as he discovered the witness intoxicated, to inform the court of the fact. The court, then, might have examined into the circumstances of the case, and, upon their finding that the witness, without the defendant's fault, was not in a situation to be examined, might have delayed the trial for a short time, or have continued the case until the next term, as the circumstances might have required.

This practice was recognized to be correct in the case of *Isely* vs. *Lovejoy*, 8 Blackf. 462.

In this last case, when the party moved for a new trial on the ground that a material witness for him was incapacitated, by intoxication, to give evidence on the trial, it was *held*, that for aught shown by the affidavits in support of the motion, the party might have previously known of the intoxication, and have been instrumental in occasioning it. *Held*, that the motion was rightly overruled.

* It is as well settled a principle of evidence, that a witness cannot be compelled to answer a question which would render him infamous, as that he is not bound to answer one when that answer might subject him to a criminal prosecution.—*U. S.* vs. *Dickinson*, 2 McLean's C. C. Rep. 325.

A deaf and dumb person, who can be communicated with by signs, is a competent witness under our statute, if he has sufficient discretion, and understands that perjury is punishable by law, though he has no conception of the religious obligation of an oath.—*Snyder* vs. *Nations*, 5 Blackf. 295.

The statute authorizes the general moral character of a witness to be inquired into; but the inquiry should be, not what it was at any former period, but what it was at the time of the trial.—*Walker* vs. *The State*, 6 Blackf. 1.

†The credit of a witness cannot be impeached by proof of particular facts.—*Ibid.*

A witness cannot be impeached on the ground that he had made previous

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ARTICLE XIV.

Depositions and written evidence.

Depositions, before whom taken.

SEC. 245. Depositions of witnesses, taken within or without the State, may be taken according to the regulations hereinafter provided, before any judge, justice of the peace, notary public, mayor or recorder of a city, clerk of a court of record, or commissioner appointed by the court to take depositions. But depositions shall not be taken before any person being of kin to either party, or interested in the action.

statements inconsistent with his testimony, until he has been asked whether he had made such statements.—*Weinzorpflin* vs. *The State*, 7 Blackf. 186.

Evidence of the declarations of a witness, made out of court, that he is interested in a suit, is inadmissible to prove him incompetent.—*Bradbury* vs. *Dougherty*, 7 Blackf. 467.

See *Beauchamp* vs. *The State*, 6 Blackf. 299. *McIntire et ux.* vs. *Young*, 6 Blackf. 496.

If the statement of the witness be relevant to the issue and he deny having made it, it may be proved; but if the statement be not relevant to the issue, the witness cannot be questioned respecting it, nor can he be contradicted if he deny having made it.—*Ibid.*

The statement of a witness made out of court, contrary to what he swears at the trial, concerning facts relevant to the issue, may be proved to impeach his credit. *Secus*, if they be irrelevant facts.—*Shields* vs. *Cunningham*, 1 Blackf. 86.

If a witness be impeached by proof of his having previously made statements inconsistent with his testimony, he may be corroborated by evidence of other statements made by him in accordance with his testimony. *Aliter*, if he has not been impeached.—*Coffin* vs. *Anderson*, 4 Blackf. 395.

A party is not permitted to prove what one of his witnesses swore to on a former trial of the cause, until he has proved that the witness is dead.—*Hobson* vs. *Doe*, 2 Blackf. 308.

Evidence of what a deceased witness swore to on a former trial, is only admissible where that trial was between the same parties that are concerned in the subsequent suit.—*Earl* vs. *Hurd*, 5 Blackf. 248.

See *Doe d. Sutton* vs. *Reagan et al.*, 5 Blackf. 217.

If a witness has been impeached by proof of his having made, previously, statements inconsistent with his testimony he may be corroborated by evidence of other statements made by him in accordance with his testimony. *Aliter*, if he has not thus been impeached.—*Coffin* vs. *Anderson*, 4 Blackf. 395.

When a witness is called for the purpose of impeaching the character for truth and veracity of a witness called on the other side, such impeaching witness can only speak of the general reputation of the witness sought to be impeached in the community, and cannot give his own opinion of his character.—*Bucklin* vs. *Ohio*, 20 Ohio Rep. 18.

Before a witness can be contradicted by proving statements out of court at variance with his testimony, he must be first inquired of on cross-examination, as to such statements, and the time, place, and person involved in the supposed contradiction.—*King* vs. *Wicks*, 20 Ohio Rep. 87.

If a witness in a deposition upon his cross-examination, state as facts circumstances not pertinent to the issue he has said and sworn in an other cause, in which these circumstances were pertinent, the statement cannot be read to discredit him.—*Lamalare* vs. *Caze*, Washington C. C. Rep. 413.

The party calling a witness is not precluded from proving the truth of a particular fact by any other competent testimony, in direct contradiction to what such witness may have testified; and this not only when it appears that the witness was innocently mistaken, but even when the evidence may collaterally have the effect of showing that he was generally unworthy of belief.—4 Com. N. Y. Rep. 303; 5 Wend. 305; 1 Greenl. Ev. § 343.

A party to a civil suit can only give evidence of the good character of him-

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Depositions—notice—time to travel—service of notice.

Sec. 246. A party wishing to take depositions, shall give notice to the adverse party, if there be only one person; if there be several, to any one of them who is a real party in interest, his agent or attorney. Such notice shall specify: Notice.

First. The cause or matter in which the deposition is to be used.

Second. The court or tribunal in which the trial is to be had.

Third. The time and place of taking the deposition.*

Sec. 247. The adverse party shall be allowed a reasonable time to travel from his usual place of abode to the place of taking the deposition, by the ordinary route of travel, exclusive of the day of service, the day of taking the deposition, and intervening Sundays. If served on an attorney or agent, a reasonable time shall be allowed him to communicate the same to the party. Time to travel.

Sec. 248. The notice may be served in the same manner and by any person authorized to serve a summons for a witness. If neither the party nor his agent or attorney reside in this State, the notice may be filed in the clerk's office, or published three weeks successively in the county in which the suit is pending. Service of notice.

self, his wife, servant or witness, in answer to impeaching evidence on the other side.—4 Com. N. Y. Rep. 493.

Held, in an action for crim. con., that the plaintiff could not give evidence of the good character of the wife previous to the adultery, there being no evidence on the other side impeaching her previous general character, or her criminal conduct with any other person than the defendant himself.—*Ibid.*

When, in such action, the wife's character for chastity has been attacked, either by the testimony of witnesses on the part of the defendant, or by the cross-examination of the plaintiff's witnesses, evidence in support of her character will be received.—*Ibid.*

* A deposition was taken in Louisville, in the State of Kentucky, on Monday, the 23d of April, in pursuance of a notice given in Charlestown, in the State of Indiana, on Saturday the 21st, at 5 o'clock in the evening. Without taking into consideration the impropriety of one party's laying another under the necessity of travelling on the Sabbath, we think the notice in this case clearly insufficient. It is not reasonable to presume that a man can at all times hold himself in readiness to answer the calls of his adversary to go at a few hours' notice, to a neighboring State. And even if he had no other preparation to make, it is necessary that the counsel should have time to confer with his client, or the client to consult his counsel, in order to cross-examine the witness with propriety.—*Henthorne* vs. *Doe*, 1 Blackf. 157.

A notice given in Daviess county in this State, on the 20th of October, to take depositions in Hamilton county, Ohio, on the 28th of the same month, is insufficient.—*Cefret* vs. *Burch*, 1 Blackf. 400.

The circumstance that a party or his attorney was present at the taking of a deposition and cross-examined the witness, making no objections, is a waiver of any objection to the notice of taking the deposition.—*Doe d. Martin* vs. *Brown et al.*, 8 Blackf. 443.

If the defendant give notice that he will take depositions in another State, before a certain justice, at a specified time and place, and the plaintiff give notice that he will also take depositions at the same time and place, and both parties attend and take depositions accordingly without objection, the defendant cannot afterwards object in court that the notice to him was insufficient.—*The President, &c.* vs. *Wadleigh*, 7 Blackf. 102.

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Depositions—in vacation—oath and examination.

Court may order depositions to be taken.

SEC. 249. In all actions the court may order the taking of depositions, whenever deemed necessary to determine the rights of the parties, or to expedite the trial of causes, and may, if necessary for that purpose, order a continuance until the next term.

Depositions in vacation.

SEC. 250. In all actions depositions may be taken by either party in vacation, immediately after the service of the summons, without an order of court, and, in term time, by the agreement of the parties. They may be used on the trial of all issues in any action in the following cases:

First. Where the witness does not reside in the county, or in a county adjoining the one in which the trial is to be held, or is absent from the State.*

Second. When the deponent is so aged, infirm or sick as not to be able to attend the court, or other place of trial, or is dead.†

Third. When the depositions have been taken by the agreement of parties, or by the order of the court trying the cause.

Fourth. When the deponent is a State or county officer, or a judge, or practicing physician, or attorney at law, and the trial is to be had in any county in which the deponent does not reside.

In either of the foregoing cases, the attendance of the witness cannot be enforced.

SEC. 251. A witness is not obliged to attend for examination upon a deposition in any other county than that of his residence, but may consent to do so.

Where the witness appears.

SEC. 252. No deposition shall be read in evidence on the trial of a cause, if at that time the witness himself is produced in court, unless the deposition has been taken by the agreement of the parties, or by the order of the court.

SEC. 253. The officer taking the deposition, shall have power to summon and compel the attendance of witnesses.

SEC. 254. The provisions of the last section shall extend to all officers and commissioners authorized to take depositions in this State, to be read in the courts of other States or countries.

Oath and examination.

SEC. 255. The deponent shall be first sworn by the officer

* A witness whose deposition had been taken *de bene esse*, under the act of 1838, was, at the time of the trial at L., acting as clerk of a steamboat on the Ohio river; the boat touching at the wharf at L., almost daily on its way up and down the river. Held, that the witness's absence sufficiently appeared to authorize the admission of the deposition.—*Percival et al.* vs. *Groff*, 8 Blackf. 233.

† If a witness has been regularly subpœnaed, but is unable to attend by reason of sickness, his deposition can be taken during term time, by giving the adverse party reasonable notice.—*Dare* vs. *McNutt et al.*, 1 Carter's Ind. Rep. 148.

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to testify to the truth, the whole truth, and nothing but the truth, relating to the cause or matter for which the deposition is to be taken; and he shall then be examined by the party producing him, and then by the adverse party, and by the officer or parties afterwards, if they see cause.

To be written and subscribed.

SEC. 256. The deposition shall be written down by the officer, or by the deponent, or by some disinterested person, in the presence, and under the direction of the officer, and after the same has been carefully read to or by the deponent, it shall be subscribed by him.

Certificate.

SEC. 257. The officer shall annex a certificate to the deposition, stating the following facts:

First. That the deponent was sworn according to law;

Second. By whom the deposition was written; and if written by the deponent, or some disinterested person, that it was written in the presence, and under the direction of the officer;

Third. Whether or not the adverse party attended;

Fourth. The time and place of taking the deposition, and the hours between which the same was taken; and the officer shall sign and attest the certificate, and seal the same, if he have a seal of office.*

Direction and indorsement.

SEC. 258. The officer taking the deposition shall seal up the same in a sufficient paper envelope, and direct the same to the clerk of the court in which the action is pending, indorsing on the envelope the names of the parties and of the witnesses whose depositions are enclosed.

SEC. 259. When a deposition is offered to be read in evidence, it must appear to the satisfaction of the court that the cause for taking and reading it still exists.

Depositions out of the State.

SEC. 260. When a deposition is to be taken within the State, no commission shall be necessary for taking the deposition. When taken out of the State, the clerk shall, upon the request of the party taking the deposition, issue a commission to the officer or commissioner designated to take the deposition. No order of court or affidavit shall be necessary to authorize the issuing of the commission.

Attestation.

SEC. 261. When the commission contains the name of the officer before whom the deposition is to be taken, his attestation, officially certifying the same shall be sufficient; but if

* A deposition is not objectionable because the name of the State where it was taken is not given in the caption, if the caption allege the deposition to have been taken agreeably to the annexed commission and notice, and the State be named in the notice attached.—*Atkinson* vs. *Starbuck*, 6 Blackf. 353.

Nor is the certificate of the justice objectionable for omitting the name of the State in which he is justice, if the certificate, by reference to the caption, show the name of such State.—*Ibid.*

It is no objection to the admission of depositions in a chancery suit certified to this court, that they were taken before the removal of the suit.—*Earl* vs. *Hurd*, 5 Blackf. 248.

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the commission do not specify the name of the officer, and he have no official seal, his certificate shall be authenticated by the certificate and seal of the clerk or prothonotary of any court of record of the county in which the officer exercises the duties of his office.

In a foreign country.

SEC. 262. When depositions are to be taken in a foreign country, they shall be taken pursuant to an order of the court under a commission; with such reasonable notice of the time and place of taking the same as the court shall require; and they shall be certified and returned by the commissioner in such manner as the court shall direct.

When and where filed.

SEC. 263. Every deposition intended to be read in evidence must be filed in court at least one day before the time at which the cause in which the deposition is to be used stands on the docket for trial; or if filed afterwards, and claimed to be used on the trial, the adverse party shall be entitled to a continuance at the costs of the party filing the deposition, upon showing good cause by affidavit.

Publication.

SEC. 264. Depositions, after being filed may be published by the clerk, at the request of either party, after giving the other, his agent or attorney, reasonable notice of the time of publication, or they may be published by the order of court on the motion of either party.*

Objections, when made.

SEC. 265. Objections to the competency of a deponent, or to the propriety of any questions proposed to him or answers given by him, may be made at the time of taking his deposition, or in court, whether made at the taking of the deposition or not.

Same.

SEC. 266. All objections to the validity of any deposition, or its admissibility in evidence, shall be made before entering on the trial, not afterwards. But any deposition after the commencement of the trial, may be suppressed, if any matter which is not disclosed in the deposition appears, which is sufficient to authorize such suppression. †

When an action has been dismissed.

SEC. 267. When an action has been dismissed, and another action has been commenced for the same cause, the depo-

* See *Dare* vs. *McNutt et al.*, 1 Carter's Ind. Rep. 148, quoted in note to Sec. 250, specification 1, of this chapter.

The circumstance that a deposition, which has been three days on file, had not been opened before the jury were sworn, is not of itself sufficient objection to its being afterwards opened and read in evidence.—*Harter* vs. *Seaman*, 3 Blackf. 27

If a deposition be improperly suppressed, the party waives the error by introducing another deposition of the same witness, testifying to the same facts.—*Sanders* vs. *Johnson*, 6 Blackf. 50.

† A deposition cannot be impeached by proving that a statement inconsistent with it had, before it was taken, been made by the deponent, unless the deposition showed that the deponent had been asked, on his examination, whether he had made such statement.—*Legg et al.* vs. *Leyman et al.*, 8 Blackf. 148. Objections to depositions must be made before trial, unless for some cause not previously known. —*Barber* vs. *Lyon*, 8 Blackf. 215.

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sitions taken in the first action may be used in the second, or in any other action betwen the parties or their representatives for the same cause; but it must appear that the depositions have been duly filed in the court where the previous cause was pending, and have remained on file from the time the action was dismissed until the time at which it was proposed to use them.

Affidavit, to take depositions, to perpetuate testimony.

SEC. 268. Whenever any person shall make affidavit before any circuit court, or court of common pleas, or judge thereof, or clerk of the court, that such person expects to be made a party in any action thereafter to be commenced, and that the testimony of a witness, whether residing within or out of the State, to be named in the affidavit, is material and necessary to the prosecution or defence thereof, the court or officer before whom the affidavit is made, shall order reasonable notice to be given to the party expected to be adverse to the applicant or to his attorney, that on the day and at the place in such notice to be expressed, the witness will be examined conditionally before such officer as shall be specified in the order.

Proof of notice.

SEC. 269. Upon proof that the notice has been given, either by personal service, or advertisement, at least three weeks successively in some public newspaper published in the proper county, or one most convenient thereto, (when the person to be notified is not an inhabitant of the State,) being made to the officer authorized to take the testimony, he shall proceed to take and certify, seal up and return the depositions according to the rules provided for other depositions in this act.*

Where filed.

SEC. 270. Every affidavit and order, and every deposition so taken and certified, shall, within thirty days after the deposition is taken, be filed in the office of the clerk of the circuit court, or court of common pleas of the county where the subject-matter of such expected suit may be situated. The clerk shall file said deposition, and it shall remain sealed until published by order of the court after commencement of such expected action.

When admitted in evidence.

SEC. 271. Upon proof of the death, insanity or absence from the State of such witness, or inability by reason of age or infirmity to attend, the deposition or a certified copy thereof by the clerk of the court where the same is filed, shall be admitted as evidence in any court in this State, in any cause between the parties named in the affidavit, or in any cause between persons claiming under either of said parties, and shall have like effect as if the witness had been personally present, and given oral testimony therein, saving the right of exception in all cases on account of the incompetency of the witness, or of any part of the testimony contained in the deposition.

* See *Whitcomb* vs. *Stewart*, 1 Carter's Ind. Rep. 208. *Quære*, whether the certificate of the clerk stating these facts, would be evidence?—*Ibid.*

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Certain errors disregarded.

SEC. 272. An unimportant deviation from any direction relative to taking depositions, shall not cause any deposition to be excluded where no substantial prejudice would be done to the opposite party.

Private Writings.

Sealed and unsealed writings.

SEC. 273. There shall be no difference in evidence between sealed and unsealed writings; and every writing not sealed, shall have the same force and effect that it would have if sealed. A writing under seal, except conveyances of real estate, or any interest therein, may therefore be changed, or altogether discharged by a writing not under seal. An agreement in writing, without a seal, for the compromise or settlement of a debt, is as obligatory as if a seal were affixed.

SEC. 274. The execution of an instrument is the subscribing and delivering it, with or without affixing a seal.

Recitals.

SEC. 275. Recitals in any written instrument shall have no greater effect that they have heretofore had in writings not under seal.

SEC. 276. The last three sections do not repeal or affect any statute of this State expressly requiring a seal to a deed or other instrument.

Of Documentary and other Written Evidence.

Evidence of certain statutes,—Illinois, &c.

SEC. 277. The printed statute books of this State, and of the late territory north-west of the river Ohio, and the territories of Indiana and Illinois, purporting to be printed under the authority of said State or territories, shall be evidence in all courts and places of the acts therein contained.

Of the U. S. and the several States.

SEC. 278. The printed statute books of the several States and territories of the United States, purporting to be printed under the authority of those States and territories; and any copy of any statute, or part thereof, contained therein, having attached thereto the certificate of the Secretary of State, under the seal of the State, certifying the copy to be complete and correct; that the statute book, from which the copy is taken, is deposited in the office of the Secretary, or in the State Library; and is by him believed to have been received under the authority of the State or territory purporting to have enacted the same; shall be presumptive evidence in all courts of the legislative acts, public or private, of those States or territories respectively.

Copies of proceedings, and judgments of justices without the State.

SEC. 279. Copies of the proceedings and judgments of any justice or justices of the peace of any State or territory of the United States, certified by the justice or justices under his or their hands and seals, before whom the proceedings were had or judgments rendered, or their successors in office

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or other justices having legal custody thereof, that the same are true and complete copies of the proceedings or judgments, with the certificate of the clerk or prothonotary of any court of record of the county or district where said justice or justices shall hold his or their office or offices, certifying under the seal of said court that the justice or justices was or were at the time when the proceedings were had or judgment rendered, and when the copy was taken, duly commissioned and qualified to act as such, shall be admissible as evidence in any of the courts in this State.*

Copies, &c., within the State.

SEC. 280. Copies of the proceedings and judgments of any justice of the peace of this State, certified under his hand and seal, or under the hand and seal of the justice who may have the legal custody thereof, as true and complete copies of such proceedings or judgments, shall be received as evidence in the several courts in this State.

Notary public's certificate.

SEC. 281. Certificates or instruments, either printed or written, purporting to be the official act of a notary public of this State, or of any other State or territory of the United States, and purporting to be under the seal and signature of such notary public, shall be received as presumptive evidence of the official character of such instrument and of the facts therein set forth.

Certificate of Sec. of State as to the publication of acts.

SEC. 282. The certificate of the Secretary of State, under the seal of State, stating the time when any act or acts of the General Assembly were deposited in his office, or deposited in the office of the clerk of any circuit court, or court of common pleas, in this State, as shall appear from the certifi-

*A justice of the peace with whom the docket of a former justice is legally deposited, may give certified copies from such docket; but the certificate must show that the justice making it has the legal custody of the docket.—*Anderson* vs. *Miller*, 4 Blackf. 417.

A paper purporting to be an affidavit made before a justice of the peace in another county, was offered in evidence. Held, that there must be proof of its authenticity in order to authorize its admission; but that it might be proved by parol evidence.—*Hagaman* vs. *Stafford*, 2 Blackf. 351.

Copies of process issued by a justice of the peace and regularly returned, are, when properly authenticated, legal evidence without accounting for the absence of the original.—*Steel* vs. *Pope*, 6 Blackf. 176.

The certificate of a justice of the peace, that a State warrant issued by another justice, is on file in the office of the justice giving the certificate, is *prima facie* evidence that it is legally there; and his certificate that a copy of the warrant is a true copy is a sufficient authentication.—*Ibid.*

In a suit against a justice for not filing in time the papers in an appeal, the best evidence of the justice's judgment is his record, or a certified copy of it; not a copy certified by the clerk, of the transcript filed in the circuit court.—*Mills* vs. *Barnes*, 4 Blackf. 438.

Parol evidence that a person has acted as a justice of the peace is admissible to prove him to be such officer.—*Brown* vs. *Connelly*, 5 Blackf. 390.

A justice's transcript certified by his successor in office was, though objected to, admitted in evidence. Held, that the admission of the transcript (the record not showing the ground of the objection) could not be said to be improper.—*Parker et al.* vs. *The State*, 8 Blackf. 292.

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cate or receipt of any such clerk, shall be admissible in all the courts of this State as evidence of the facts stated in such secretary's certificate.

Copies of records; records of deeds.

SEC. 283. Exemplifications or copies of records, and records of deeds or other instruments, or of office books or parts thereof, and official bonds which are kept in any public office in this State, shall be proved or admitted as legal evidence in any court or office in this State, by the attestation of the keeper of said records, or books, deeds or other instruments, or official bonds, that the same are true and complete copies of the records, bonds, instruments or books, or parts thereof, in his custody, and the seal of office of said keeper thereto annexed, if there be a seal, and if there be no official seal, there shall be attached to the attestation, the certificate of the clerk, and the seal of the circuit court of the proper county where such keeper resides, that said attestation is made by the proper officer.*

*_Act of Congress, March 27th_, 1804.

SEC. 1. From and after the passage of this act, all records and exemplifications of office books, which are or may be kept in any public office of any State, not appertaining to a court, shall be proved or admitted in any court or office in any other State by the attestation of the keeper of the said records or books, and the seal of his office thereto annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county or district, as the case may be, in which such office is or may be kept; or of the governor, the secretary of state, the chancellor or the keeper of the great seal of the state, that the said attestation is in due form, and by the proper officer; and the said certificate, if given by the presiding justice of a court, shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or if the said certificate be given by the governor, the secretary of state, the chancellor or keeper of the great seal, it shall be under the great seal of the state in which the said certificate is made. And the said records and exemplifications, authenticated as aforesaid, shall have such faith and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state from whence the same are or shall be taken.

SEC. 2. All the provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, courts, and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States as to the public acts, records, office books, judicial proceedings, courts, and offices of the several states.--Gordon's Digest, arts. 941, 942.

To make the certified copy of a record of a public office, not appertaining to a court, admissible evidence in another State, under the act of Congress of 1804, the certificate of the proper officer must state the attestation of the keeper of the records or books to be in due form.—*Henthorn* vs. *Doe*, 1 Blackf. 157.

The seal of the general land office, and the signature of the commissioner thereof, to copies of papers required by law to be deposited in that office, *prima facie* prove themselves.—*Harris* vs. *Doe*, 4 Blackf. 369.

A patent for United States' land which appears to be signed by the President, countersigned by the commissioner of the general land office, and verified by the seal of that office, is admissible as evidence without proof of its execution. —*Bowser* vs. *Warren*, 4 Blackf. 522.

A copy of the record of a patent for United States' land, from the general land office under the signature of the commissioner and the seal of the office, is admissible in evidence if the original patent be lost or destroyed —*Smith* vs. *Mosier*, 5 Blackf. 51.

Sworn copies of affidavits on file in the office of a register of the land office,

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Acts of corportions—of legislatures—judicial proceedings.

Acts and proceedings of corporations

SEC. 284. The acts and proceedings of corporations may be proved by a sworn copy of the record of such acts and proceedings; the oath shall be made by the person having the legal custody of such records and shall state that such transcript is a true and full copy of the original, and that such original has remained unaltered from its date, to the best of deponent's knowledge and belief. Such sworn copies shall be received as evidence in all cases in which the original would be evidence.

Acts of the legislature.

SEC. 285. Every act of the legislature of any one of the States or territories of the United States, certified by the Secretary, and having the seal of the State or territory affixed thereto, shall be deemed authentic, and receive full faith and credit when offered in evidence in any court within this State.*

Judicial proceeding of courts.

SEC. 286. The records and judicial proceedings of the several courts of record, of or within the United States or the territories thereof, shall be admitted in the courts within this State as evidence, by attestation or certificate of the clerk or prothonotary, and the seal of the court annexed, together with the seal of the chief justice or one or more of the judges, or the presiding magistrate of any such court, that the person who signed the attestation or certificate was, at the time of subscribing it, the clerk or prothonotary of the court, and that the attestation is in due form of law; and the records and judicial proceedings, authenticated as aforesaid,

respecting a pre-emption right, are admissible as evidence in cases in which the originals, could they be procured, would be evidence.—*Ibid.*

The assessment roll of county taxes of 1822 was held inadmissible evidence in support of a tax title to a town lot, without proof that the valuation of the lot had been legally made.—*Kinney* vs. *Doe d. Laman et al.*, 8 Blackf. 350.

The record of deeds of a county, showing an entry by a recorder of the redemption of land sold on execution, is not conclusive evidence of such redemption.—*Nichols* vs. *Woodruff*, 8 Blackf. 493.

A copy of the record of a patent for U. S. lands (such copy being certified by the commissioner of the general land office) is admissible evidence, if the absence of the original be sufficiently accounted for.—*Stephenson* vs. *Doe d. Wait et al.*, 8 Blackf. 508. *Semble*, that such copy is admissible evidence without accounting for the absence of the original, if the party offering the copy be not the patentee.—*Ibid.*

The facts necessary to show that evidence previously given was admissible, may be proved at any time during trial.—*Ibid.*

The county record book of deeds is admissible to prove a conveyance of real estate therein recorded, if offered by a suitor not being a party to the conveyance, nor appearing to have it under his control.—*Foresman* vs. *Marsh*, 6 Blackf. 285.

The record of a conveyance, shown to be a true copy, is admissible evidence for the grantee, satisfactory proof having been given of the loss of the original, and its execution duly proved.—*McNeely et al.* vs. *Rucker*, 6 Blackf. 391.

* The exemplification of a statute under the seal of State is admissible evidence, under the act of Congress of 1790, without the attestation of any public officer.—*Henthorn* vs. *Doe*, 1 Blackf. 157.

The only legal evidence of the selections of lands donated to the State by the act of Congress of March 2, 1827, for the construction of the Wabash and Erie canal, is a properly certified copy thereof from the office of the Secretary of the Treasury of the U. S.—*Doe* vs. *Stephenson*, 1 Carter's Ind. Rep. 115.

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shall have full faith and credit given to them in any court within this State, as, by law or usage, they have in the courts whence taken.*

Proof of publication of notice

SEC. 287. When notice is, in any action, proceeding, or sale under execution, or other matter required by the provisions of law, to be given by publication in any newspaper, an affidavit of the printer, or any person in his employ, as a clerk or printer, of a competent age, annexed to a copy of the notice taken from the paper in which it was published, may be filed in the clerk's office by the person whose duty it was to cause the publication to be made; such affidavit must specify the county, the time when, and the paper in which the notice was published.†

*_Act of Congress, May 26th_, 1790.

The acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto: the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken.—Gordon's Digest, article 940.

See Constitution of the United States, art. 4, sec. 1. R. S. Vol. 1, p. 30.

A transcript of the record of a judgment is not admissible as evidence unless it have a _placita_ and be legally authenticated.—_Doe_ vs. _Smith_, 4 Blackf. 228.

If the clerk's certificate, attached to the copy of letters testamentary from a probate court of another State, have not the seal of the court or officer granting the letters, the copy is not admissible as evidence.—_Allen_ vs. _Thaxter_, 1 Blackf. 399

The transcript of a record of the district court of the United States for this State under the seal of the court, and certified by the clerk to be a complete copy of the record, is admissible as evidence in the courts of this State.—_Adams_ vs. _Lisher_, 3 Blackf. 241.

The constitution of the United States, requiring full faith and credit to be given in each State to the judicial proceedings of every other State, does not apply to a judgment which has been rendered without the defendant's having had legal notice of the suit.—_Cone_ vs. _Cotton_, 2 Blackf. 82.

The judgment of a court of record of competent jurisdiction in one State, fairly obtained, when the defendant had personal notice of the suit, is conclusive between the parties in an action on it in any other State; the circumstance that the judgment is against the defendant as special bail makes no difference.—_Holt_ vs. _Alloway_, 2 Blackf. 108.

To an action on the judgment of a court in another State, the defendant may plead that the judgment was obtained by fraud, or that the court had no jurisdiction of the person or of the subject matter.—_Ibid._

A judgment obtained conformably to the laws of the State against a person resident therein, without personal notice of the suit, is not conclusive against him in an action on it in another State; nor is such judgment absolutely void as the judgment of a court having no jurisdiction. The judgment, in such case, stands on the same footing with a foreign judgment; and if it be against special bail, he may, in an action on it in another State, plead that no ca. sa. had issued against his principal.—_Ibid._

See _Hedman et al._ vs. _Gould_, 7 Blackf. 361.

†Notice in a newspaper to a non-resident defendant in a bill in chancery, to appear before the circuit court of the proper county on the first day of its next term, is sufficiently certain as to time and place of appearance.—_Thomas_ vs. _Bailey_, 7 Blackf. 149.

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Affidavits—laws of other States and countries—proof of service of process, &c.

Original affidavit, &c., presumptive evidence.

SEC. 288. The original affidavit and copy of the notice, filed pursuant to the provisions of the last section, and copies thereof, duly certified by the clerk, shall be presumptive evidence in all cases and before every court, of the facts contained in the affidavit.

Affidavit taken in another State

SEC. 289. When any affidavit is taken in another State and certified by the officer or justice of the peace taking the same, under his hand and seal of office, if he have any such seal, and attested by the clerk of the circuit or district court, or court of common pleas of the county where such officer exercises the duties of his office, under the hand of the clerk and the seal of his court, the clerk also certifying that the officer or justice of the peace, is, by the laws of said State, duly empowered to administer oaths and affirmations, and take affidavits, every such affidavit shall be deemed sufficiently authenticated, and may be received and used in any of the courts of this State.*

Common law of another State, how proved.

SEC. 290. The unwritten or common law of any other of the United States, or of the territories thereof, may be proved as facts by parol evidence, and the books of reports of cases adjudged in their courts may also be admitted in evidence of such law. †

Law of a foreign country.

SEC. 291. The existence and tenor or effect of the laws of any foreign country, may be proved as facts by parol evidence; but if it shall appear that the law in question is contained in a written statute or code, the court may, in their discretion, reject any evidence of such law which is not accompanied by a copy thereof.

Service of process and notice, how proved

SEC. 292. The proof of the service of any process issued by the court, or of any notice required to be served upon any party, shall be as follows:

First. If served by the sheriff, his certificate thereof; or,

Second. By any other person, his affidavit thereof; or,

Third. In case of publication, a printed copy, with the

* An affidavit, made for the purpose of procuring a foreign attachment, was offered in evidence. There was annexed to the affidavit a certificate purporting to be signed and sealed by A. B., stating that the affidavit had been sworn, in the city and State of New York, before said A. B., commissioner in said State to take depositions, affidavits, &c., to be used or recorded in the State of Indiana, &c. Held, that without further proof, the affidavit was not admissible in evidence.—*Draper* vs. *Williams*, 8 Blackf. 574.

† The written laws of other States of the Union cannot be proved here by parol evidence —*Comparet* vs. *Jernegan et al.*, 5 Blackf. 375.

The statutes of other States are not noticed by our courts unless they be pleaded and proved.—*Elliott* vs. *Ray*, 2 Blackf. 31. *Irving* vs. *McLean*, 4 Blackf. 52.

The exemplification of a statute under the seal of State, is admissible evidence under the act of Congress of 1790, without the attestation of any public officer.—*Henthorn* vs. *Doe*, 1 Blackf. 157.

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affidavit of the printer, his foreman, or clerk, or of any competent witness.

Fourth. The written admission of the defendant. The affidavit or admission must state the time and place of service.

Clerk to indorse date of filing.

SEC. 293. The clerk shall indorse upon every paper filed in his office or in open court, and upon every process returned to him or to the court, except summonses, the date of the filing and return; and the indorsement shall be presumptive evidence of the time of the filing and return.

ARTICLE XV.

Examination of Parties.

When discovery allowed.

SEC. 294. No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, except in the manner prescribed by this chapter [article.]

Adverse party may be examined as a witness.

SEC. 295. A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination as any other witness, to testify, either at the trial, or conditionally, or upon commission.

Examination may be had before trial.

SEC. 296. The examination, instead of being had at the trial, may be had at any time before the trial, at the option of the party claiming it, before any officer authorized to take depositions, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless for good cause shown, the court order otherwise. But the party to be examined before trial, shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons.

Attendance and examination.

SEC. 297. The attendance of the party to be examined, may be enforced, and the examination shall be taken and filed as a deposition in the cause, and may be read by the party taking it, at his option; but if not read, the party causing the examination shall pay the costs thereof.

SEC. 298. The evidence of the party, thus taken, may be rebutted by adverse testimony.

SEC. 299. Any party refusing to attend and testify as above provided, may be punished as for a contempt, and his complaint, answer, or reply, may be stricken out.

To what may testify.

SEC. 300. A party examined by an adverse party may testify in his own behalf in respect to any matter pertinent to the issue; but if he testify to any new matter not responsive to the inquiries put to him by the adverse party, such adverse party may offer himself as a witness on his own behalf in respect to the new matter, and shall be so received.

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Examination of parties—production and inspection of writings.

Beneficial parties.

SEC. 301. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

May be examined on behalf of his co plaintiff, &c.

SEC. 302. A party may be examined on behalf of his co-plaintiff or co-defendant, as to any matter in which he is not jointly interested, or liable with such co-plaintiff or co-defendant, and as to which a separate and not joint judgment shall be rendered; and he may be compelled to attend in the same manner as at the instance of an adverse party; but the examination thus taken shall not be used in behalf of the party examined at the instance of the adverse party.

When interrogatories are to be answered, &c.

SEC. 303. Either party may propound interrogatories to be filed with the pleadings relevant to the matter in controversy, and require the opposite party to answer the same under oath. All interrogatories must be answered within the time limited, positively, and without evasion, and the court may enforce the answer by attachment or otherwise, and the party may, in addition thereto, set forth in his answer, all relative matter in avoidance; the answer to the interrogatories may be used or not, on the trial, at the option of the party requiring it.

ARTICLE XVI.

Production and inspection of Writings.

Writing, when and how may be introduced in evidence.

SEC. 304. If either party at any time before trial allow the other an inspection of any writing, material to the action, whether mentioned in the pleadings or not, and deliver to him a copy thereof, with notice that he intends to read the same in evidence on the trial of the cause, it may be so read, without proof of its genuineness or execution, unless denied by affidavit before the commencement of the trial; if such denial be made of any writing, not mentioned in the pleadings, the court may give time to either party to procure evidence when necessary for the furtherance of justice.

Parties, when compelled to produce papers.

SEC. 305. The court or judge thereof may, upon motion, compel by order, either party to produce, at or before the trial, any book, paper, or document in his possession or power; the order may be made upon application of either party, upon reasonable notice to the adverse party, or his attorney,—if not produced, parol evidence may be given of their contents.

Copies of books and documents.

SEC. 306. The court, or a judge thereof, may, under proper restrictions, upon due notice, order either party to give the other, within a specified time, an inspection and a copy, of any book or part thereof, paper or document in his possession, or

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under his control, containing evidence relating to the merits of the action, or the defense therein; if compliance with the order be refused, the court, on motion, may exclude such evidence, or punish the party refusing, or both.

The following decisions of courts concerning the rules of evidence, are here appended for convenient reference:

PAROL EVIDENCE.

See notes, R. S., vol. 2, page 80, 81, and 82.

Parol evidence is that which is given by witnesses, *viva voce*, in contradistinction to that which is written, or documentary. It is a general rule that oral evidence shall in no case be received as equivalent to, or as a substitute for, a written instrument which is defective in any particular which by law is essential to its validity; or to contradict, alter or vary, a written instrument, either appointed by law, or by the contract of the parties, to be the appropriate and authentic memorial of the particular facts it recites; for, by doing so, oral testimony would be admitted in usurpation of a species of evidence decidedly superior in degree.—20 Johns. 49; 11 Mass. R. 30; 3 Marsh. 333.

But parol evidence is admissible to defeat a written instrument on the ground of fraud, mistake, &c., or to apply it to its proper subject-matter; or, in some instances, as ancillary to such application, to explain the meaning of doubtful terms, or to rebut presumptions arising extrinsically. In these cases parol evidence does not usurp the place or arrogate the authority of written evidence, but either shows that the instrument ought not to be allowed to operate at all, or is essential in order to give the instrument its legal effect.—11 Mass. Rep. 30; 1 Peters' C. C. Rep. 85.

Evidence is admissible to show another consideration than that expressed in the deed, if not inconsistent with the consideration expressed.—11 Wheat. 199.

When a written contract is to be proved not by itself, but by parol testimony, no vague, uncertain recollection, concerning its stipulations, ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily.—1 Peter's 596

Parol testimony is not admissible in an action on the covenant of seisin, to prove prior claims on the land.—4 Cranch, 421.

When a check was drawn by a person who was cashier of an incorporated bank, and it appeared doubtful upon the face of the instrument whether it was an official or a private act, parol evidence was admitted to show that it was an official act.—5 Wheat. 326.

In ascertaining the facts, as connected with the execution of any written instrument, parol testimony is admissible.—Ibid.

The meaning of parties to written instruments, must be ascertained by the tenor of the writing, and not by looking at a part of it; and, if a latent ambiguity arises from the language used, it may be explained by parol testimony.—6 Peters, 328.

The declarations of a party on one day, as explanatory of what was said by him on another day, and which was given in evidence, cannot be shown by testimony. What a party has said one day against his interest, cannot be explained by declarations on a subsequent day.—Peters' C. C. Rep. 16.

Parol evidence of the declarations of an auctioneer, contrary to the written terms of the sale, is inadmissible; but such evidence as to the property intended to be sold by him, is proper.—Peters' C. C. Rep. 199.

Written documents, certified by foreign notaries, offered as evidence, may be contradicted by parol testimony.—Peters' C. C. Rep. 450.

Parol evidence bearing upon written contracts and papers, ought not to be admitted in evidence, without the production of such written contracts or papers; so as to enable both the court and the jury to see whether or not the admission of the parol evidence in any manner will trench upon the rule that parol evidence is not admissible to vary or contradict written instruments.—14 Peters, 448.

When, in taking the acknowledgment of a deed, the justice omitted to state his official character, parol proof of his being a justice is admissible.—McLean's C. C. Rep. 520.

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Rules of evidence—parol.

The affidavit of the party himself that his impression is, that he tore up the paper containing the contract, after it had been carried into execution, believing it of no further consequence, and that, if he did not tear it up, it has become lost or mislaid, and that he has searched for it repeatedly, and cannot find it, furnishes a sufficient ground for the introduction of secondary evidence.—9 Wheat. 483.

The contents of a receipt said to have been signed by one of the defendants, or the manner of signing it, cannot be given in evidence; the receipt should be produced.—3 Wash. C. C. Rep. 246.

Extrinsic evidence is not admissible to explain a patent ambiguity; that is, one apparent on the face of the instrument; but it is admissible to explain a latent ambiguity; that is, one not apparent on the face of the instrument, but one arising from extrinsic evidence; that is, but to remove the ambiguity by the same kind of evidence as that by which it is created.—13 Peters, 89.

A receipt is only evidence of payment, and may be contradicted by parol.—3 McLean's Rep. 265.

Parol evidence may be given not to contradict the terms of a written warranty, but to show that the property was taken by the purchaser subject to incumbrances which he knew to exist at the time of the purchase, though they were not mentioned in the deed.—*Allen, Adr.* vs. *Lee*, 1 Carter's Ind. Rep. 58.

Debt on the bond of a justice of the peace, for money which a judgment-defendant paid to the justice on a judgment obtained against him by the relator, and which the justice refused to pay over on demand. The relator, after proving that the justice had admitted that the judgment was paid, but without saying to whom, offered to prove the following: that, after the rendition of the judgment, the judgment-defendant showed the witness a receipt which he said the justice had given him; that, afterwards, he asked the justice whether the judgment had been paid, and whether he gave such receipt, and that the justice answered affirmatively. The court would not permit this evidence to be given. Held, that the evidence was admissible, not to prove the contents of the receipt, but that the jury might take it into consideration in determining whether the justice was the person to whom the money was paid, or not.—*The State, &c.* vs. *Dailey*, 1 Carter's Ind. Rep. 252.

An ambiguity arising from the phraseology of written evidence—not from extrinsic matter—cannot be explained by parol evidence.—*The Richmond, &c.*, vs. *Farquar*, 8 Blackf. 89.

Parol evidence is inadmissible to prove what the verdict was in a previous suit, and that there was no new trial in such suit.—*Abrams* vs. *Smith*, 8 Blackf. 95.

Parol evidence of the terms of an agreement which the party has shown to be in writing is inadmissible.—*Patterson* vs. *Doe d. Fisher*, 8 Blackf. 237.

A written agreement cannot be shown by parol evidence to be different from what it purports to be.—*Russell et al.* vs. *Branham et al.*, 8 Blackf. 277.

A written agreement cannot be controlled by setting up a cotemporaneous verbal understanding of the parties inconsistent with it.—*Jacobs* vs. *Finkel*, 7 Blackf. 432.

Suit on a written promise by the defendant to assign to the plaintiff a note on a third person. Held, that parol evidence tending to show that the assignment was to be without recourse, was inadmissible.—*Blair et al.* vs. *Williams*, 7 Blackf. 132.

In a suit on a promissory note payable on demand, brought by the payee against the maker, it was held that parol evidence of the plaintiff's declaration at the time the note was executed, that payment of it was not to be demanded until after his death, &c., was inadmissible.—*Graves* vs. *Clark*, 6 Blackf. 183.

Semble, that a stranger to a record can give it in evidence against the successful party, in a subsequent suit against such stranger for the same cause of action.—*Jenners* vs. *Oldham*, 6 Blackf. 235.

If the defendant seeks to use a bond in evidence, which had been used by the adverse party in a former suit, and by him voluntarily left on file with the other papers of the cause in court, he must ask permission of the court to give it in evidence from the files; and he cannot, by giving notice to the adverse party to produce the bond, and on the failure of the latter to do so, give parol evidence of its contents.—*Dare* vs. *McNutt et al.*, 1 Carter's Ind. Rep. 148.

The contents of a paper cannot be proved by secondary evidence, unless its loss or destruction be positively proved, or it appear that *bona fide* and diligent search

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had been made for it in vain, where it was likely to be found.—*Murray* vs. *Buchanan*, 7 Blackf. 549.

And in general the loss of the paper must be proved by the person in whose hands it was at the time of the loss, or to whose custody it was traced.—*Ibid.*

If the defendant in ejectment refuse to produce on the trial, a patent from the United States to the plaintiff's lessor for the land in controversy—the patent being in the defendant's possession, and due notice having been given him to produce it—secondary evidence of the contents of the patent would be inadmissible, without proof of the execution of the original, were proof of its execution otherwise necessary.—*Rawley* vs. *Doe d. Beauchamp et ux.*, 6 Blackf. 143.

But extrinsic proof of the execution of such patent is in no case necessary in the first instance.—*Ibid.*

In case of the defendant's refusal as aforesaid to produce the patent, a copy, whether in the record book of the county or not, proved by a witness on the trial to be a true copy, or a certified copy from the records of the general land office, may be given in evidence.—*Ibid.*

The contents of a written instrument cannot be proven by a deposition, without accounting for the absence of the original.—*Dumont* vs. *McCracken*, 6 Blackf. 355.

A subpœna *duces tecum* in this case, was served three or four days before the trial, on a lessor, requiring him to produce his lease. He was sworn as a witness, and stated that he had not had time to search all his papers to find the lease, but that he had made some search in the most probable places; that he might have destroyed it, but he did not recollect to have done so; that he had not seen it for a year, &c. Held, that the loss of the lease was not sufficiently proved to authorize the admission of parol evidence of its contents.—*McNeely et al.* vs. *Rucker*, 6 Blackf. 391.

The facts that a note was sent by mail in a letter directed to a post master in another State, to have its execution proved, do not sufficiently prove the loss of the instrument to admit parol evidence of its contents.—*Depue* vs. *Wheelan et al.*, 6 Blackf. 485.

The contents of a note were proved by parol evidence, without accounting for the absence of the note, the evidence not being objected to. Held, that the admission of the evidence in such case, was not erroneous.—*Hommell* vs. *Gamewell*, 5 Blackf. 5.

See *The State* vs. *Lockwood et al.*, 5 Blackf. 144.

Proof of the loss of an instrument of writing is sufficient to authorize the introduction of secondary evidence of its contents: notice to the adverse party of the loss, &c., not being necessary for that purpose.—*McCreary* vs. *Hood*, 5 Blackf. 316.

See *Doe d. Bowen* vs. *Holmes*, 5 Blackf. 319; *Carlton* vs. *Litton*, 4 Blackf. 1.

If any instrument of writing, or even the record of a judgment, be lost or destroyed, the contents may be proved by parol evidence.—*Jackson* vs. *Cullam*, 2 Blackf. 228.

Assumpsit on the following instrument of writing: "Recd., Vincennes, Sept. 14, 1822, of A. B., 200 dolls. for safe keeping." Held, that the defendant could not introduce parol testimony to prove that the money was not deposited for safe keeping, but was paid in discharge of a debt.—*Tisloe* vs. *Grailor*, 1 Blackf. 353.

WRITTEN EVIDENCE.

See notes, R. S. Vol. 2, p. 80, 81 and 82.

Assumpsit by Dundas, Lewis, Jones, Pittfield and Howell. The declaration averred that the plaintiffs were the owners of a certain tract of land, &c.; that the defendants made their certain writing, &c., whereby they acknowledged themselves tenants on said land, and agreed to pay the plaintiffs, &c. An agreement was produced corresponding with that set out in the declaration, except that it was signed S. Kirby, agent for James Dundas, and others. Held, that it was not sufficient to prove the contract declared on, without proof of its execution.—*Warden* vs. *Dundas*, 1 Carter's Ind. Rep. 396.

A judgment in a suit on a sealed note in favor of the maker, when the only plea was a failure of consideration, is no evidence of such failure in a subsequent suit against the indorser, who had no notice of the first suit.—*Morris* vs. *Lucas*, 8 Blackf. 9.

The defendant in assumpsit may, under the general issue, give in evidence a writing executed by him to the plaintiff, if it tend to show the nature of the transaction involved in the suit, and if its stipulations have been performed by both

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parties, although the instrument may be invalid as a contract, for want of mutuality.—*McNutt et al.* vs. *Dare*, 8 Blackf. 35.

It appeared in a suit by a vendor of land for the purchase money, that the parties had agreed that the tract of land sold (the number of acres not being known) should be surveyed by a certain person, and that that person had surveyed it accordingly. *Held*, that the survey was *prima facie* evidence for the complainant of the number of acres which the tract contained.—*Conwell* vs. *Claypool*, 8 Blackf. 124.

Trover by husband and wife. *Held*, that the declarations of the wife's mother, who had been former wife of the defendant, as to the ownership of the property in dispute, which declarations were made while the mother was the guardian of the daughter, and had possession of the property and before her marriage with the defendant, were not evidence for the plaintiffs.—*Collis* vs. *Brown et ux.*, 8 Blackf. 262.

If the goods on which an execution is levied be taken from the officer by a judgment in favor of the claimant, on a trial of the right of property, the judgment is conclusive as to the right of that property, in a suit against the officer for a false return of the execution.—*Limpus* vs. *The State*, 7 Blackf. 43.

Debt on a promissory note. Pleas, fraud and failure of consideration. The defendant offered in evidence, on the trial, an advertisement by the plaintiff for the private sale of certain real estate, for a part of the price of which the note sued on had been given The advertisement represented the land as containing a coal bank, &c., and had been inserted in a newspaper published in the county in which the land was situate. There was no proof of the publication of the advertisement, except in December, 1838; and the purchase of the land was not made until April, 1840; nor did it appear that the advertisement had been ever seen by the defendant. Held, that the advertisement, under the circumstances, was inadmissible as evidence.—*Clawson et al.* vs. *Lowry*, 7 Blackf. 140.

When the question in a suit in the circuit court is, whether a judgment in another action had been reversed or not, the record of the court that reversed the judgment, or an agreement of the parties that it had been reversed, is sufficient to prove the reversal.—*Glover* vs. *Foote*, 7 Blackf. 293.

Assumpsit for money paid by the plaintiff for the defendant's use and at his request on a writing obligatory for the payment of money, payable to one T. W., in which the defendant was principal and the plaintiff his surety, and which the plaintiff had to pay. Plea, non-assumpsit without oath. Held, that the writing obligatory, not being the foundation of the suit, was not admissible as evidence without proof of its execution by the defendant.—*Jessup* vs. *Gray*, 7 Blackf. 332.

In assumpsit against A. and B., the plaintiff offered in evidence a paper purporting to be an answer of A. to a bill in chancery filed against him and B. in the Clark circuit court. There was no proof of A.'s signature to the paper, nor that it was entitled to the character given to it by the plaintiff. Held, that the evidence was inadmissible.—*Johnson et al.* vs. *Prather*, 6 Blackf. 411.

In assumpsit for goods sold and delivered, &c., the plaintiffs proved that the defendant had admitted his receipt of the goods, &c., but had qualified his admission by saying that some of the items in the account should have been credited on a certain written agreement made by him and another with the plaintiffs. *Held*, that the plaintiffs might give in evidence the written agreement thus referred to by the defendant.—*Richardson* vs. *The St. Joseph Iron Company*, 5 Blackf. 146.

To prove that a suit had been defeated by a plea of infancy, a record of the suit should be produced.—*Doe d. Sutton* vs. *Reagan et al.*, 5 Blackf. 217.

In a suit by the State, on the relation of Samuel D. Vance and David Clarke, trading under the name of Vance and Clarke, on a constable's bond, the declaration alleged that the relators, by the name of Vance and Clarke, recovered judgment, &c.; that an execution issued on the judgment in said name, &c., which execution the constable failed to return, &c. Plea, *nul tiel record*. Held, that said judgment and execution were admissible evidence for the plaintiff.—*Bohon et al.* vs. *The State*, 5 Blackf. 467.

A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife to have been written by her husband, she also swearing, in her deposition, that the facts mentioned in the letter had been frequently mentioned by her husband in his lifetime, is legal evidence, as is also the deposition of the witness, in a question of pedigree.—1 Peters, 337.

If a party who gives notice to produce papers, afterwards waive reading them in evidence, he may do so; and the papers are not made evidence by the notice calling on the opposite party for them.—Peters' C. C. Rep., 64.

An instrument of writing more than forty years old, is not required to be

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proved with the same strictness as one of modern date, unless there be facts and circumstances proved which create doubts as to its genuineness.—1 McLean's C. C. Rep., 124.

Entries made in a book of accounts, by a clerk, who is deceased, are evidence. The original book, however, must be produced. But to make such entries evidence, they must have been regularly entered, and the books upon their face must have the appearance of fairness.—2 McLean's C. C. Rep., 469.

In general judgments and decrees are evidence only in suits between parties and privies; but the doctrine is wholly inapplicable to a case where a decree in equity was not introduced as *per se*, binding upon any rights of the other party, but as an introductory fact to a link in the chain of the plaintiff's title, and constituting part of the muniments of his estate.—4 Wheat. 213.

The books of a corporation established for public purposes, are evidence of its acts and proceedings.—5 Wheat. 420.

A judgment or decree of a court of competent jurisdiction is conclusive whenever the same matter is again brought in controversy. But the rule does not apply to points which come only collaterally under consideration, or are only incidentally considered, or can only be argumentatively inferred from the decree.—6 Wheat. 109.

To prove boundary, a map which has governed in the sale of town lots is evidence.—1 McLean's C. C. Rep. 47.

The statement made by a witness in a book published in regard to the facts sworn to, may be read to show any inaccuracy of memory.—*Ibid.*

The books of a party are not evidence, unless made so by a call to produce them.—2 McLean's C. C. Rep. 35.

A witness whose books are out of his reach, so that he cannot have access to them, may testify to their contents.—3 Sumner's C. C. Rep. 1.

To introduce into a cause the copy of any paper, the truth of that paper must be established; and sufficient reasons for the non-production of the original given.—4 Cranch, 62; 2 Cond. Rep. 26.

The name of an obligor may be erased from a bond, and a new obligor inserted, by consent of all parties, without making the bond void; such consent may be proved by parol evidence; and it is immaterial whether the consent be given before or after the execution of the deed.—9 Cranch 28; 3 Cond. Rep. 244.

It is a general principle that memorandums made by a person in the ordinary course of his business, of acts which his duty in such business requires him to do for others, are, in case of his death, admissible evidence of acts so done. *A fortiori*, the acts of a public officer are so admissible, though they may not be strictly official, if they are according to general usage, and the ordinary course of his office.—8 Wheat. 326: 5 Cond. Rep. 451.

Therefore the books of a notary public, proved to have been regularly kept, are admissible in evidence, after his decease, to prove a demand of payment, and notice of non-payment of a promissory note.—*Ibid.*

Where one party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement in his own handwriting, but not signed by him, and from the nature of the instrument it was to be fairly presumed the original was in his custody, notice to produce the original paper, in order to give the copy in evidence, is not necessary.—1 Peters 22.

When letters, a part of the evidence in the court below, have become lost or mislaid, every thing is to be presumed to have been contained in them, to support the opinion of the court in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents.—*Ibid.*

In an action for work and labor performed in part execution of a written contract since rescinded, the contract is competent evidence.—20 Ohio Rep. 361.

An entry made by one of the parties to a suit in an account book, cannot be proved by parol evidence, without accounting for the absence of the book.—*Witt* vs. *Bird*, 7 Blackf. 258.

As to the introduction of partnership account books in evidence in a suit between partners, see *Thompson et al.* vs. *Fry*, 7 Blackf. 608.

A plaintiff may introduce his book of original entries to show that a note claimed by the defendant as a set-off, had been credited to the latter in an account between the parties, known to have been previously settled.—*Powers* vs. *Hamilton*, 6 Blackf. 293.

The plaintiff's books of account, in which he has charged the items for which

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he sues are not admissible evidence to support his demand.—*DeCamp et al.* vs. *Vandagrift*, 4 Blackf. 272.

The plaintiff produced a receipt in evidence and proved its execution, but did not offer to read it, until his closing argument to the jury; the reading of the receipt was then objected to, because it had not been previously read. *Held*, that the objection was insufficient.—*Harter* vs. *Seaman*, 3 Blackf. 27.

An entry in the partnership books, by one of the partners in the business of a saw-mill, charging himself with a boat which he had built at the mill, may be introduced as evidence by him, *inter alia*, to prove the boat to be his individual property.—*Reno* vs. *Crane*, 2 Blackf. 217.

D. had given to K. a receipt as follows: "Rec'd 17th Oct. 1821, of J. Kelsey, 250 dollars, which, with 100 dollars formerly rec'd, (as per rec'pt given Mr. K.) I am to lay out for him in Louisville, in such goods as will suit the Terre Haute market, charging him cost and carriage; or, should this mode of settlement not be desired, I am to pay the amount in specie, adding a premium of two per cent. —say in all 357 dollars, with interest from the date until paid. Francis Dickson, Jun."

In an action by K. against D., in which K. claimed the whole amount named in this receipt, it was held that, though the original receipt for a hundred dollars was not produced, nor its absence accounted for, that circumstance was not of itself sufficient to exclude K. from the benefit of the receipt for the whole amount, including the 100 dollars acknowledged to have been previously received. —*Kelsey* vs. *Dickson*, 2 Blackf. 236.

A deed of conveyance more than 30 years old, unaccompanied by any suspicious circumstances, requires no proof; and a deed may be valid without being recorded, except as to subsequent purchasers, without notice.—*Hawthorn* vs. *Doe d. Sheppard*, 1 Blackf. 157.

GENERAL PRINCIPLES OF EVIDENCE.

The law requires that the best evidence which the case admits of should be adduced. By the best evidence is understood that proof which most certainly exhibits the true state of facts to which it relates. But when such primary evidence is not within the power of the party, secondary evidence is admissible. As, when a written instrument is necessary in the support of an action, is in the possession of the opposite party, or is lost or destroyed, evidence of its contents may be admitted. But before secondary evidence can be given of the contents of a paper which is in possession of the opposite party, notice must be given to such party to produce it on the trial.—1 Peters 596; 3 T. Rep. 306.

And before such evidence can be received, proof must be made that the primary evidence cannot be had, and all the proper sources from which it can be obtained must be exhausted before the secondary evidence can be received.—1 Phil. Ev. 116; 4 Cranch 62; 2 Cond. Rep. 26.

Hearsay Evidence, or the mere declarations of third persons as to a fact, is in general inadmissible. But many facts, from their very nature, either absolutely, or usually, exclude direct evidence to prove them, being such as are either necessarily, or usually, imperceptible by the senses, and therefore incapable of the ordinary means of proof. These are questions of pedigree or relationship, character, prescription, custom, boundary, and the like; as also questions which depend upon the particular exercise of skill and judgment. Such facts, some from their very nature, and others from their antiquity, do not admit of the ordinary and direct means of proof by living witnesses; and, consequently, resort must be had to the best means of proof which the nature of the case affords.—1 Phil. Ev. 185; 1 Stark. Ev. 44; 7 Cranch 290; 2 Cond. Rep. 496; 6 Peters 328.

Positive Evidence is that which, if believed, establishes the truth of the fact in issue, and does not arise from any presumption. Evidence is direct and positive, when the very facts in dispute are communicated by those who have the actual knowledge of them by means of their senses. In one sense there is but little direct and positive proof, or such proof as is acquired by means of one's own senses; but, in common acceptation, direct and positive evidence is that which is communicated by one who has actual knowledge of the fact.—1 Stark. 19.

Presumptive Evidence is that which is not direct, but where, on the contrary, a fact which is not positively known, is presumed or inferred from one or more other facts or circumstances which are known.—Ros. Cr. Ev. 13; 1 Stark. 18.

Prima Facie Evidence of a fact, is such an evidence as in judgment of law, is

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sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregard it. It would be error on their part, which would require the remedial interposition of the court. In a legal sense, then, such prima facie evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact.—6 Peters, 622.

The confessions of an agent are not evidence to bind his principal, nor is his subsequent account of a transaction to his principal, evidence. But his acts within the scope of his powers, are obligatory upon his principal; and those acts may be proved in the same manner as if done by the principal. The agent acting within his authority, is substituted for the principal in every respect, and his statements, which form a part of the *res gestæ*, may be proved.—9 Peters, 682.

When words are to be proved by witnesses who depend on memory alone, the precise terms employed by the parties will seldom be recollected; and courts and juries must form their opinions upon the substance, and upon all the circumstances.—4 Cranch, 219.

Where a writing has been fraudulently destroyed, for fraudulent purposes, or to create an excuse for its non-production, secondary evidence of its contents is not admissible.—9 Wheat. 483.

The rules of evidence, that in questions of pedigree and relationship, the declarations of aged and deceased members of the family may be proved and given in evidence, has not been controverted.—1 Peters, 337.

The affidavit of a party to a cause, of the loss or destruction of an original paper, offered in order to introduce evidence of the contents of the paper, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least in a court of law.—1 Peters, 576.

What an individual may have said, as to a certain corner or line, is not evidence, though public reputation may prove boundaries.—1 McLean's C. C. Rep. 518.

Where the original corners and lines are established, they control courses and distances. But courses and distances govern, when there are no established objects to control them.—*Ibid.*

The upsetting of a stage is *prima facie* evidence of negligence; and a passenger, who has been injured, needs not any thing more to sustain his action.—1 McLean's C. C. Rep. 540.

The proprietor is not responsible for casualties which could not be foreseen or guarded against.—*Ibid.*

But he is liable for the smallest degree of negligence, want of care, or want of skill in the driver.—*Ibid.*

The negotiations and conversations of a party, charged with false and fraudulent representations, are allowed to be taken into consideration in order to determine the question of fraud.—3 Summer's C. C. Rep. 1.

The general rule at law is, that no evidence shall be admitted but what is or might be under the examination of both parties.—3 Summer's C. C. Rep. 98.

Debt on a note as follows: "Logansport, Dec. 18, 1838. Due John Hoover 717 dolls. and 68 cents, to be paid as soon as it can be collected by bringing suits on the notes and accounts that were taken for flour and provisions. Henry Weirick." The plaintiff proved that in December, 1839, the defendant agreed to give a new note, payable one day after date, in place of the above, if the plaintiff would throw off the interest thereon. He also proved that the note sued on was also given for flour, &c., which the defendant had sold on commission. Held, that the plaintiff might then prove that the sale of the flour, &c., was to be for cash only. Held, also, that the note sued on might draw interest before the claims mentioned in it were collected. Held, also, that the defendant's offering to give a new note, as above stated, tended to show that said claims had been collected.— *Weirick* vs. *Hoover*, 8 Blackf. 379.

Suit commenced by A. before a justice of the peace, and taken by appeal to the circuit court. Held, that, on the trial on appeal, the defendant might prove admissions which had been made by the plaintiff as a witness, in a previous suit in the circuit court, brought by one B. against the defendant.—*McKinzie* vs. *Reneau*, 8 Blackf. 411.

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Rules of evidence—general principles.

The admission of one defendant, does not go to charge his co-defendant.—3 McLean's Rep. 549.

The statement of a fact may be made by a witness to the best of his recollection or belief, or as he thinks the fact to be, and the evidence is admissible.—*Rhode* vs. *Louthain et al.*, 8 Blackf. 413.

An action of assumpsit for work and labor, &c , was commenced in the circuit court, the plaintiff claiming $500 damages. Pleas, the general issue, statute of limitations, and a set-off. The plaintiff, on the trial, proved by a witness the performance of service for the defendant, by feeding and taking care of the latter's cattle. Held, that the defendant might, on cross-examination, ask the witness whether, at the time of said service, the plaintiff was using the cattle for his own benefit.—*Dayton* vs. *Hall*, 8 Blackf. 556.

It is necessary to the admission of evidence of what a deceased witness swore to on a former trial, that it be proved by the record of that trial, that the suit was between the same parties and for the same cause of action.—*Ephraims et al.* vs. *Murdock*, 7 Blackf. 10.

And the precise words of the deceased witness, and not merely the substance of them, must be proved.—*Ibid.*

A party may introduce his evidence in the order he prefers, provided there is reason to suppose that the evidence offered is connected with the cause.—*Clawson et al.* vs. *Lowry*, 7 Blackf. 140.

An offer, concession, or admission, made in the course of an ineffectual treaty of compromise, and constituting, in itself, the point yielded for the sake of peace, and not because it was just or true, is not competent evidence against the party making it; but the law is otherwise with regard to an independent fact admitted to be true, but not constituting such yielded point.—*Wilt* vs. *Bird*, 7 Blackf. 258.

A., an indorsee of a sealed note for the payment of 1000 dollars, indorsed it in blank to B., who without indorsing the note, delivered it to C., and the latter sold it to D., without indorsing it. D. sued A. as indorser, an indorsement in full to the plaintiff being written over the defendant's name. Held, that, supposing the plaintiff could only recover the amount the defendant had received from B. for the note, (of which however, no opinion was given,) still a statement made by B. whilst he held the note, that he had paid for it only 650 dollars, could not be proved by the defendant, B. himself being a competent witness in the cause.—*Lynn* vs. *Jeter*, 7 Blackf. 300.

Suit on a note for the payment of money, given for the right to make and sell fanning mills within certain limits. It appeared by the note and the article of agreement, that the note was to be paid, provided the payee did not make or sell, within the prescribed limits, more than four such mills. Held, that, on the question whether the plaintiff had made or sold as aforesaid more than four such mills, the burthen of proof was on the defendant.—*Bowser et al.* vs. *Bliss et al.*, 7 Blackf. 344.

A., being in partnership with B., collected a sum of money in his individual capacity for C., and afterwards executed to the latter a note in the name of the firm for the amount. In a suit against the firm on the note, the plaintiff offered to prove that A., during the existence of the firm, had declared that said money had been used by himself and partner in the business of the partnership. Held, that the evidence was inadmissible.—*Hickman* vs. *Reineking*, 6 Blackf. 387.

The declaration of a clerk since deceased, who had approved and filed a replevin-bond, that the surety had been deceived as to its execution, &c., is hearsay and inadmissible as evidence.—*Doe d. Burge et al.* vs. *Cunningham*, 6 Blackf. 430.

The admissions of the assignor of a note, made after the assignment, are not receivable in evidence to prejudice his assignee.—*Lister* vs. *Boker*, 6 Blackf. 439.

Evidence of declarations, &c., made at the time of a transaction that is the subject of inquiry, and which are a part of the *res gestæ*, is admissible.—*Doe d. Sutton* vs. *Reagan et al.*, 5 Blackf. 217.

Irrelevant testimony is inadmissible.—*Adamson et al.* vs. *Wood et al.*, 5 Blackf. 448.

Same point decided.—*Tillotson* vs. *Doe d. Gregory et al.*, 5 Blackf. 590.

In an action against a principal and his surety, the admissions of the principal may be proved to show his own liability. Whether they are admissible as evidence against the surety?—*quære.*—*Darter et al.* vs. *The State*, 5 Blackf. 61.

Action on the case for causing water to flow back on the plaintiff's land, and thus producing a loss of his building materials on the premises. Plea, not guilty. Held, that the plaintiff could not prove, in aggravation of damages, a loss of build-

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ARTICLE XVII.

Empanneling Jurors.

Jury, when called.

SEC. 307. In any civil action, where the parties are entitled to a trial by jury, and either party shall demand such trial, the sheriff shall call a jury from the regular pannel, except as hereinafter provided.

Number of jurors.

SEC. 308. The number of jurors to try a civil action shall not exceed twelve, nor be less than three. The parties may determine the number of jurors by agreement, and in case of their disagreement, the number shall be twelve.

Special jury.

SEC. 309. The parties may agree upon the jurors to compose a special jury, and notify the court thereof, and the court shall thereupon direct the sheriff to empannel such special jury, if it can be done without unreasonable delay of the cause.

Agreement of parties as to summoning, and striking out names of jurors.

SEC. 310. When both parties desire it, the court may direct the sheriff to summon eighteen competent jurors, or a less number, and the plaintiff first, and then the defendant, shall strike off one juror in turn, until each has struck off six or more, and the remaining jurors shall try the cause; or the parties, when they consent, upon being furnished with a list of jurors to be summoned, may exercise the right to strike out any part of the names before the jurors are summoned, and the remaining jurors only shall be summoned.

Challenges.

SEC. 311. It shall be sufficient cause for challenge to a juror, that he is interested in another suit, begun or contemplated, involving the same or a similar matter.

ing materials on the land, if they belonged to the plaintiff and another in partnership.---*Trimble* vs. *Gilbert*, 3 Blackf. 218.

The defendant, in an action for an assault and battery, cannot prove, in mitigation of damages, that the plaintiff had previously slandered him, if there had been time, between the provocation and the assault, for deliberate reflection.—*Fullerton* vs. *Warrick*, 3 Blackf. 219.

A. entered into partnership with B. in the business of tanning; and C. bound himself in a covenant to B. for A.'s conduct as a partner for a certain time. Held, that, in an action by B. against C. on the covenant, the admissions of A., made after the expiration of the stipulated time, were not admissible as evidence against C.—*Hotchkiss* vs. *Lyon et al.*, 2 Blackf. 222.

It seems that when one party receives money of another, and there is no explanation of the fact, the presumption is that he receives it because it is his due, and not by way of a loan.—1 Comstock's N. Y. Rep. 377.

But when a witness testified that he asked the defendant if he had any money of the plaintiff, and the defendant replied that he had had twenty dollars of him, and the witness then told the defendant that the plaintiff had requested the witness to speak to him about it, to which the defendant made no reply, but turned away, it was held, that the jury might infer from this evidence that the money was received by way of a loan.—*Ibid.*

Proof of the execution of a bond may be made by proving the hand writing of the subscribing witnesses, after showing that they do not reside in the State.—*Gordon* vs. *Miller*, 1 Carter's Ind. Rep. 531.

The subscribing witnesses to a deed are the proper persons to prove its execution, if they are within the jurisdiction of the court, and competent to testify.—*Sampson* vs. *Grimes*, 7 Blackf. 176.

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Empanneling jurors—trial—issues.

Oath.

SEC. 312. Before the commencement of the trial, an oath must be administered to each juror that he will well and truly try the matter in issue between the parties, and a true verdict give, according to law and evidence.*

Peremptory challenges.

SEC. 313. In all cases where the jury consists of six or more persons, each party shall have three peremptory challenges. If the jury consists of a less number than six, each party shall have two peremptory challenges.†

SEC. 314. When the regular pannel is exhausted, or is insufficient from any cause, the sheriff shall call the bystanders, or fill the jury in such a manner as the court may direct.

ARTICLE XVIII.

Trial and its incidents.

What day trial to be had.

SEC. 315. Every action shall stand for issues and trial at the first term after it is commenced, when the summons has been served on the defendant ten days, or publication has been made sixty days before the first day of the term.

Issues.

Issues of law and fact.

SEC. 316. Issues arise on the pleadings where a fact, or conclusion of law, is maintained by one party, and controverted by the other. They are of two kinds:

First. Of law.

Second. Of fact.

*There were two issues of fact, and the jury were sworn to try the *issue*. Held, that it was too late for the defendant, after verdict and judgment against him, to object to the informality of the oath to the jury.—*Lindly et al.* vs. *Kindall*, 4 Blackf. 189.

See *Judah* vs. *McNamee*, 3 Blackf. 269.

The practice of swearing a jury as well to try the issue in fact, as to inquire of the damages on an issue in law previously found for the plaintiff, obtains only in cases when the decision of the issue in law entitles the plaintiff to damages, without regard to the trial of the issue in fact.—*Swann* vs. *Rary*, 3 Blackf. 298.

† The plaintiff's right to challenge remains open until the juror is sworn.—*Jackson et al.* vs. *Pittsford*, 8 Blackf. 194. Same point decided in case of *Wyatt* vs. *Noble*, 8 Blackf. 507.

When a challenge is allowed, it must be presumed, the contrary not appearing, that the same was authorized by the circumstances of the case.—*Cable* vs. *The State*, 8 Blackf. 531.

A petit juror being challenged, stated on oath, that he did not know but that he had formed an opinion in the case from rumor: but that he thought his opinion would readily yield to the evidence, if it should differ from the rumor he had heard. Held, that the challenge was not sustained.—*Van Vacter* vs. *McKillip*, 7 Blackf. 31.

A juror may be asked on the *voire dire*, in a civil as well as a criminal case, whether he has formed or expressed an opinion on the merits of the cause.—*Maize* vs. *Sewell*, 4 Blackf. 447.

When a jury is necessary to try a cause, the legislature of the State cannot reduce the number required by common law, which defines a jury to be a body of twelve men.—Baldwin's C. C. Rep. 222.

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Trial—issues of law and fact.

SEC. 317. An issue of law arises upon demurrer to the complaint, answer or reply, or to some part thereof.

When an issue of fact arises.

SEC. 318. An issue of fact arises:

First. Upon a material allegation in the complaint, denied by the answer.

Second. Upon a set-off or counter claim presented in the answer, and denied by the reply.

Third. Upon material new matter in the reply, which shall be considered as controverted by the opposite party, without further pleading.

SEC. 319. The trial is a judicial examination of the issues, whether of law or of fact, in an action.

SEC. 320. Issues of law must be tried by the court. Issues of fact must be tried by a jury, unless a jury trial is waived.*

SEC. 321. The trial in each action shall be in the order in which it stands upon the docket; unless the court, for good cause shown, shall direct otherwise.

Postponement of trial for witnesses.

SEC. 322. A motion to postpone the trial on account of the absence of evidence, can be made only upon affidavit, showing the materiality of the evidence expected to be obtained, and that due diligence has been used to obtain it, and

* A trial without an issue is erroneous.—1 Carter's Ind. Rep. 104.

See same point decided in case of *Muhan et al.* vs. *Sherman*, 8 Blackf. 63; also, *Neely* vs. *Chinn*, 8 Blackf. 84; also, *Shiel* vs. *Ferriter*, 7 Blackf. 574.

Where there are two issues, one in law, and the other in fact, the plaintiff cannot have final judgment until both issues are found in his favor.—*Beard* vs. *Adams*, 8 Blackf. 469.

The existence of any fact relative to the issue, may be proved.—*Newell* vs. *Downs*, 8 Blackf. 523.

When there are several issues in fact *arising from pleas to the whole cause of action*, the plaintiff cannot recover unless he succeed on all the issues.—*Way* vs. *Simmons*, 8 Blackf. 559.

Debt on a writing obligatory for the payment of money. There was no plea filed. The cause was submitted to the court without a jury, upon an agreed statement of facts. Judgment for the plaintiff. Held, that there being no issue in the cause, the judgment was erroneous.—*Crist* vs. *Crist*, 8 Blackf. 574.

A matter of fact, improperly alleged in pleading to be a matter of record, may be referred to a jury.—*Grimes* vs. *Alsop*, 7 Blackf. 269.

In debt there are two issues of fact, one immaterial, the other valid and founded on a plea in bar to the whole cause of action. Verdict for the defendant. Held, that the immateriality of one of the issues was no cause for setting aside the verdict.—*The State* vs. *Hood et al.*, 7 Blackf. 127.

The court tries an issue of *nul tiel record*.—*Hooker et al.* vs. *The State*, 7 Blackf. 272; *White* vs. *Elkin*, 6 Blackf. 123; *Merkle* vs. *Bolles et al.*, 6 Blackf. 288.

In a suit for an account, where there are issues of law and fact, a final judgment for the plaintiff for the amount of his claim, without a jury of inquiry and without evidence, is erroneous.—*Stewart et al.* vs. *Cantrall*, 6 Blackf. 74.

If to a plea of former recovery, the plaintiff reply that the causes of action are not the same, the issue is for the jury.—*James* vs. *The Lawrenceburgh Ins. Co.*, 6 Blackf. 525.

Whether a witness is interested is a question for the court.—20 Ohio Rep. 135.

In an action for a malicious prosecution, probable cause is a mixed question of law and fact; the court must leave the facts with the jury, with instruction as to what is probable cause.—20 Ohio Rep. 119.

The existence of a verbal contract, and its stipulations, is a question of fact for the jury.—20 Ohio Rep. 361.

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where the evidence may be; and if it is for an absent witness, the affidavit must show where the witness resides, and the probability of procuring his testimony within a reasonable time, and what facts he believes the witness will prove, and that he believes them to be true, and that he is unable to prove such facts by any other witness whose testimony can be as readily procured. If, thereupon, the adverse party will consent that on the trial the facts shall be taken as true, the trial shall not be postponed for that cause.*

Continuance.

SEC. 323. Any court, for good cause shown, may continue any action at any stage of the proceedings, at the cost of the applicant, to be paid as the court shall direct.†

Trial by Jury.

Order of trial.

SEC. 324. When the jury has been sworn, the trial shall proceed in the following order, unless the court, for special reasons, otherwise directs:

First. The party on whom rests the burthen of the issues,

* In a suit in the circuit court of Orange county, an affidavit was made for a continuance on account of the absence of A. and B., material witnesses for the deponent. The affidavit stated (as to the diligence used) that the deponent had had a *subpœna* issued for said witnesses by the clerk of said court since the then last term of said court, which *subpœna* was placed in the hands of the sheriff of said county; that said witnesses were not in attendance; and that the deponent expected to procure their testimony by the next term of the court. Held, that the affidavit did not show sufficient diligence.—*Dickey* vs. *Morgan*, 8 Blackf. 533.

A motion to continue a cause in order to procure the testimony of an interested witness may be overruled.—*Jacobs* vs. *Finkel*, 7 Blackf. 432.

The refusal to continue a cause on account of the absence of a witness, if the continuance be applied for in a sufficient affidavit, is error.—*Bradbury* vs. *Dougherty*, 7 Blackf. 467.

If the continuance of a cause be applied for on the ground that a witness who had been *subpœnaed* does not attend, the return of the sheriff must be produced. *Gordon* vs. *Spencer*, 2 Blackf. 286.

A defendant in an action of slander may prove, under the general issue, the general bad character of the plaintiff in mitigation of damages; and, therefore, the defendant's affidavit for a continuance in such case, on account of the absence of witnesses by whom that fact could be proved, cannot be objected to on the ground that the witnesses are not material.—*Woods* vs. *Anderson et ux.*, 5 Blackf. 598.

See *Nixon* vs. *Brown*, 3 Blackf. 504.

An affidavit for a continuance on account of absent witnesses, must clearly show their materiality.—*Gordon* vs. *Spencer*, 2 Blackf. 286.

† The defendant's affidavit for a continuance, stated that he had been unable to prepare for a trial in consequence of severe bodily affliction under which he had labored ever since, and long before the process was served, that he believed he had a meritorious defense, and could be ready for trial at the next term; and that the affidavit was not made for delay. *Held*, that the affidavit was insufficient.—*Pine* vs. *Pro et al.*, 6 Blackf. 426.

If the continuance of a cause be refused, when the party is legally entitled to it, the judgment will be reversed.—*Vanblaricum* vs. *Ward*, 1 Blackf. 50. *Fuller* vs. *The State*, Id. 63.

The appointment of a *next friend* for an infant plaintiff, at the term to which the writ is returnable, does not entitle the defendant to a continuance.—*Harvey* vs. *Coffin*, 5 Blackf. 566.

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may briefly state his case, and the evidence by which he expects to sustain it.

Second. The adverse party may then briefly state his defense, and the evidence he expects to offer in support of it.

Third. The party on whom rests the burthen of the issues, must first produce his evidence; the adverse party will then produce his evidence.

Fourth. When the evidence is concluded, and either party desires special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking the same, and delivered to the court.*

Fifth. When the argument of the cause is concluded, the court shall give general instructions to the jury, which shall be in writing, and be numbered and signed by the judge, if required by either party.

Sixth. Where either party asks special instructions to be given to the jury, the court shall either give each instruction as requested, or positively refuse to do so; or give the instructions with a modification, in such manner that it shall distinctly appear what instructions were given, in whole or in part, and in like manner those refused, so that either party may except to the instructions, as asked for, or as modified, or to the modification. All instructions given by the court must be signed by the judge, and filed, together with those asked for by the parties, as a part of the record. The instructions shall not be entered at large on the final

* When the court has been requested to give the instructions to the jury in writing, it is erroneous to recapitulate the substance of the testimony verbally, notwithstanding the court states that the jury should not take its statements.—*McClary* vs. *The State*, 1 Carter's Ind. Rep. 385.

The court cannot give any instructions which will take from the jury the right of weighing what effect the evidence will have. An instruction founded on part of the evidence is erroneous.—9 Peters, 292.

The court was requested to say to the jury, that the facts given in evidence in the trial of the case did not import such a lending as amounted to usury. By the supreme court:—The court was asked to usurp the province of the jury, and to decide on the sufficiency of testimony, in violation of the well established principle, that the law is referred to the court, the fact to the jury.—9 Peters, 418.

An instruction to the jury which would separate the circumstances of the case from each other, and the object of which is to induce the court, after directing the jury that they ought to be considered together, to instruct them that, separately, no one in itself amounted to usury, ought not to have been given.—*Ibid.*

The court ought not to instruct, and indeed, cannot instruct, on the sufficiency of evidence; but no instruction should be given, except upon evidence in the case. When there is evidence on a point, the court may be called upon to instruct the jury in the law, but it is for them to determine the effect of the evidence.—9 Peters, 541.

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record, unless either party may wish to remove the cause to a superior court.*

* If the court give an erroneous instruction, but afterwards correct the mistake by giving a legal instruction, there is no error.—*Fairfield* vs. *Browning*, 1 Carter's Ind. Rep. 322. Same point decided in *Gronour* vs. *Daniels*, 7 Blackf. 108; also, see *Gharkey* vs. *Halstead*, 1 Carter's Ind. Rep. 389.

The dismission of a cause by the circuit court, on motion, without any reason appearing on the record in favor of, or against the dismission, must be presumed to be correct.—*Inhabitants of congressional township, &c.* vs. *Clark et al.*, 1 Carter's Ind. Rep. 139.

See same point decided in *Conoway* vs. *Weaver*, 1 Carter's Ind. Rep. 263.

If a charge given to a jury would be correct if certain evidence were given, the supreme court will presume that such evidence was given, the record not showing the contrary.—*Abrams* vs. *Smith*, 8 Blackf. 95.

Same point decided in 8 Blackf. 262.

The refusal to give an instruction to a jury is not erroneous, if the same instruction had been previously given.—*Ibid.*

The party complaining of a refusal to give an instruction to the jury, must show, by the record, that there was evidence given to which the instruction was applicable.—*Ibid.* See same point decided in case of *Marquis* vs. *Rogers*, 8 Blackf. 118.

An irrelevant instruction should not be given to the jury.—*Patterson* vs. *Doe d. Fisher*, 8 Blackf. 237.

An erroneous instruction to the jury, if the verdict be right, is no cause for reversing a judgment.—*Casteel* vs. *Casteel*, 8 Blackf. 240.

The refusal of an instruction to the jury, if the evidence do not appear, will be presumed to be correct.—*The State* vs. *Beackmo*, 8 Blackf. 246.

If in an action of trespass, the facts attempted to be proved do not, in law, amount to trespass, the court should, on the defendant's motion, so inform the jury.—*Crookshank* vs. *Kellogg*, 8 Blackf. 256.

When there is any evidence, however slight, tending to prove any fact, essential to the maintenance of the suit, the question as to the sufficiency of the evidence to establish the fact, is for the jury.—*Ibid.*

But if there is no evidence at all tending to prove such fact, it is the duty of the court to instruct the jury that the law is with the defendant, and that they should find for him.—*Ibid.*

After the testimony in this case was closed, the defendants moved that every instruction, or modification, or explanation thereof to the jury, should be in writing, and objected to any being given unless in writing. Held, that the court, by afterwards giving, at the plaintiff's request, instructions to the jury with verbal explanations and illustrations, committed an error.—*Townsend et al.* vs. *Doe d. Chapin et al.*, 8 Blackf. 328.

Instructions to a jury are no part of the record, unless made so by a bill of exceptions.—*Roberts* vs. *Ward*, 8 Blackf. 333.

An erroneous instruction to a jury cannot be assigned for error, if it be clear that the jury were not misled by the instruction.—*Ellison* vs. *Dove*, 8 Blackf. 571.

A judgment shown to be right by the record, will not be reversed on account of any instructions given to the jury.—*Hooker et al.* vs. *The State*, 7 Blackf. 272.

If a refusal of instructions be right under any supposable state of facts, it cannot be assigned as error.—*Kinsey* vs. *Grimes*, 7 Blackf. 290.

If evidence not material to the issue be introduced, the court may instruct the jury to disregard it.—*Utter* vs. *Vance*, 7 Blackf. 514.

If objectionable testimony admitted by the circuit court, do not appear to have been objected to, it will be presumed that it was admitted by consent.—*Stephens et al.* vs. *Lawson*, 7 Blackf. 275.

The refusal of instructions to the jury, (the record not showing them applicable to the case) cannot be assigned for error.—*Amick* vs. *O'Harra*, 6 Blackf. 258.

Special, charges to the jury, which are included in general charges previously given, should be refused.—*Gentry* vs. *Bargis et ux.* 6 Blackf. 261.

If no objection be made to an instruction to a jury when it is given, it cannot be objected to on error.—*Comparet* vs. *Hedges*, 6 Blackf. 416.

The court may either state to the jury from memory the law applicable to the

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Exceptions to instructions.

SEC. 325. A party excepting to the giving of instructions, or the refusal thereof, shall not be required to file a formal bill of exceptions; but it shall be sufficient to write at the close of each instruction, "refused and excepted to," or "given and excepted to," which shall be signed by the party or his attorney.

Argument.

SEC. 326. The parties may either submit or argue the case to the jury. In the argument, the party having the burthen of the issue, shall have the opening and closing; but shall disclose in the opening all the points relied on in the cause; and if in the closing he refer to any new point or fact not disclosed in the opening, the adverse party shall have the right of replying thereto, which reply shall close the argument in the case.

Judge's notes.

SEC. 327. It shall be the duty of the court when requested by either party to take brief notes of the evidence of the parties in the order in which the same is introduced on the trial.

View of property in controversy.

SEC. 328. Whenever, in the opinion of the court, it is proper for the jury to have a view of real or personal property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of a sworn officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial.

Retirement of jury.

SEC. 329. Whenever a case is finally submitted to the jury, they may decide in court, or retire for deliberation. If they retire, they must be kept together in some convenient place, under the charge of a sworn officer, until they agree

case, or read it to them from a book in which it is contained.—*Lett* vs. *Horner*, 5 Blackf. 296.

The court instructed the jury, that they might consider whether the terms cancelling the contract, and rescinding the contract, did not mean the same in common parlance. *Held*, that the instruction was not objectionable.—*Ibid.*

An instruction to the jury that the minutes of the testimony taken by the plaintiff 's counsel, and read by him to the jury in the course of his argument, *if correctly taken*, were evidence though not correct in terms, could not mislead the jury, and were therefore no cause for a new trial.—*Brown* vs. *Connelly*, 5 Blackf. 390.

It is a sufficient objection to an instruction to a jury, that it might convey to the mind of every man of ordinary capacity an incorrect view of the law applicable to the case.—*Sumner* vs. *The State*, 5 Blackf. 579.

The court ought not to express to the jury any opinion as to the sufficiency of the evidence.—*Huckleman et al.* vs. *Moat*, 4 Blackf. 164.

If a passage in a law book of another country, be not law here it ought not to be read to the jury.—*Nixon* vs. *Brown*, 4 Blackf. 157.

The court cannot give an unqualified charge to the jury, that the evidence is insufficient to support the action, unless in cases where it would be bound to set aside the verdict, if for the plaintiff.—*The Governor* vs. *Shelby*, 2 Blackf. 26.

The court is not bound to instruct a jury upon an abstract question of law.—*Huntington* vs. *Colman*, 1 Blackf 348.

See *Jared* vs. *Geodtitle d. Hill*, 1 Blackf. 29.

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Separation of jury—may come into court for instructions—when discharged.

upon a verdict, or are discharged by the court, subject to the discretion of the court to permit them to separate temporarily and at their meals. The officer having them under his charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court; and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations, or the verdict agreed upon.*

Separation of jury.

SEC. 330. If the jury are permitted to separate, either during the trial or after the cause is submitted to them, they must be admonished by the court that it is their duty not to converse with, or suffer themselves to be addressed by, any other person on any subject of the trial; and during the trial, that it is their duty not to form or express among themselves an opinion thereon until the cause is finally submitted to them.†

Jury may come into court for instructions.

SEC. 331. After the jury have retired for deliberation, if there is a disagreement between them as to any part of the testimony, or if they desire to be informed as to any point of law arising in the case, they may request the officer to conduct them into court, where the information required shall be given in the presence of, or after notice to, the parties or their attorneys.

When jury may be discharged.

SEC. 332. The jury may be discharged by the court on account of the sickness of a juror, or other accident or calamity requiring their discharge, or by consent of both

* After the evidence is closed and the jury have retired, it is too late to move for the discharge of one of the defendants on the ground that there is no evidence against him.—4 Comstock's N. Y. Rep. 546.

† *Semble*, that a jury may, by leave of the court, seal up their verdict, separate for the night, and deliver in the verdict next morning; but that if, in the interim, any of the jurors be improperly practiced upon, the verdict will be set aside.—*Harter* vs. *Seaman*, 3 Blackf. 27.

A jury, by consent of parties and the court, sealed up their verdict in the evening, separated, met again in the morning, and gave it in. The verdict being defective, the jury retired by the direction of the court, reconsidered it, and returned a correct one. Held, that this proceeding was not erroneous.—*Tyrrell et al.* vs. *Lockhart*, 3 Blackf. 136.

See *Busley* vs. *Farquar et al.*, 2 Blackf. 61.

The affidavits of jurors may be received in support of their verdict, but not to impeach it.—*Barlow* vs. *The State*, 2 Blackf. 114.

If a juror, during a trial, converse with a by-stander, or leave the court room, without consent of the court, it is a misdemeanor. But if the investigation of the cause was not interrupted; if nothing took place which could influence the juror; and if no attempt was made to tamper with him, the misconduct will not entitle the defendant to a new trial, after verdict against him, even in case of manslaughter.—*Ibid*

After a trial in a civil suit had commenced, the jury were permitted, by consent of parties, to disperse until the next day. One of the jurors failing to appear next day, the jury were discharged, and another impanneled. Held, that this proceeding was not erroneous.—*Harris* vs. *Doe d. Barnett et al.*, 4 Blackf. 369.

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parties, or after they have been kept together until it satisfactorily appears that there is no probability of their agreeing.

Cause to be tried again.

SEC. 333. In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately, or at a future time, as the court may direct.

Verdict.

SEC. 334. When the jury have agreed upon their verdict, it must be reduced to writing and signed by the foreman; and when returned into court, the foreman shall deliver the verdict, and either party may poll the jury. If any juror dissent from the verdict, they shall again be sent out to deliberate.*

Verdicts.

General and special verdict.

SEC. 335. The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving judgment thereon to the court.†

Court may direct special verdict, when.

SEC. 336. In all actions the jury, unless otherwise directed by the court, may in their discretion render a general or special verdict; but the court shall, at the request of either party, direct them to give a special verdict in writing upon all or any of the issues; and in all cases, when requested by either party, shall instruct them, if they render a general verdict, to find specially upon particular questions of fact to

*See ante R. S., Vol. 2, p. 24.

† If the jury in a suit for libel, agree that each juror shall write down the sum he is willing to assess as damages, that the aggregate shall be divided by twelve, and, the result shall be the verdict, it will be erroneous. Otherwise, if they do not agree to be bound by the result.—*Dunn et al.* vs. *Hull*, 8 Blackf. 32.

Affidavits of jurors, or of a party as to jurors' statements, are inadmissible to impeach their verdict.—*Ibid.*

If a declaration contain two counts, and there be a plea, to one, and an issue of fact thereon, and the other be unanswered, a general verdict for the plaintiff, (the record not showing to which count the evidence was applied,) cannot be sustained.—*Weirick* vs. *Hoover*, 8 Blackf. 379.

When in an action of debt there are several issues in fact, a verdict in general terms "for the plaintiff," may be valid; but a verdict in such case as to only one of the issues, not noticing the others, is bad.—*Wright* vs. *The State*, 8 Blackf. 385.

The circumstance that the jury, in a civil action had, after the cause was submitted to them, separated from Saturday night till Monday morning when they gave in their verdict, is not sufficient, of itself, to vitiate the verdict.—*Drummond* vs. *Leslie*, 5 Blackf. 453.

The affidavit of a third person that he had heard several of the jurors say respecting their verdict in a civil suit, that each had proposed a certain sum, that the aggregate was divided by twelve, and that the amount thus obtained, was adopted as their verdict, whether it shows any misconduct or not, is not admissible to impeach their verdict.—*Ibid.*

The jury cannot, in any case, find a verdict of *non-suit*.—*The State* vs. *Beem et al.*, 3 Blackf. 222.

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be stated in writing. This special finding is to be recorded with the verdict.

SEC. 337. When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

SEC. 338. In actions for the recovery of money, the jury must assess the amount of the recovery.

SEC. 339. In actions for the recovery of specific personal property, the jury must assess the value of the property, as also the damages for the taking or detention, whenever, by their verdict, there will be a judgment for the recovery or return of the property.* Recovery of personal property.

Trial by the Court.

SEC. 340. The trial by jury may be waived by the parties in all actions, in the following manner: When trial by jury may be waived.

First. By failing to appear at the trial.

Second. By written consent in person, or by attorney, filed with the clerk.

Third. By oral consent in open court, entered on the record.

SEC. 341. Upon trials of questions of fact by the court, it shall not be necessary for the court to state its finding, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial, in which case the court shall first state the facts in writing, and then the conclusions of the law upon them, and judgment shall be entered accordingly. Finding of the court, how stated.

Exceptions.

SEC. 342. An exception is an objection taken to a decision of the court upon a matter of law.† Exceptions.

SEC. 343. The party objecting to the decision must except at the time the decision is made; but time may be given to reduce the exception to writing, but not beyond the term, unless by special leave of the court. It shall not be necessary to copy a written instrument, or any documentary evidence into a bill of exceptions; but it shall be sufficient to refer to such evidence, if its appropriate place be designated by the words "here insert." When and how exceptions are taken.

SEC. 344. No particular form of exception is required. The objection must be stated with so much of the evidence Form.

* See ante, R. S. Vol. 2, p. 54, notes to Sec. 128.

† See *Huff* vs. *Gilbert*, 4 Blackf. 19; *Spears* vs. *Clark*, 6 Blackf. 167; *Doe ex d. Calvert* vs. *Makepeace*, 8 Blackf. 575.

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as is necessary to explain it, and no more, and the whole as briefly as possible.

Objections appearing on record.

SEC. 345. Where the decision objected to is entered on the record, and the grounds of objection appear in the entry, the exception may be taken by the party, causing to be noted at the end of the decision that he excepts.

Exceptions to be reduced to writing, when.

SEC. 346. Where the decision is not entered on the record, or the grounds of objection do not sufficiently appear in the entry, the party excepting must reduce his exception to writing, and present it to the judge for his allowance and signature. If true, the judge shall sign it, whereupon it shall be filed with the pleadings as a part of the record, but shall not be spread at large on the order book. If the writing is not true, the judge shall correct it, or suggest the correction to be made and sign it.*

A question of law may be reserved.

SEC. 347. Either party may reserve any question of law decided by the court, during the progress of the cause, for the decision of the supreme court. Any question of law so reserved, may be taken to the supreme court upon the bill of exceptions showing the decision; or, if it arises on demurrer, upon the pleadings involved. When the question so reserved is shown by bill of exceptions, the party excepting shall notify the court that he intends to take the question of law to the supreme court upon the bill of exceptions only, and the court shall thereupon cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record of the cause only, and the statement of the court, as will enable the supreme court to apprehend the particular question involved.

Reserved question taken up on appeal.

SEC. 348. The party excepting may take the reserved question to the supreme court by appeal, at any time within one year after final judgment in the cause, and not afterwards. The appeal in such case shall not stay proceedings upon the judgment, unless so ordered by the the supreme court, or some judge thereof.

Trial by Referees.

What referred.

SEC. 349. All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties.

Trial and report.

SEC. 350. The trial by referees is conducted in the same manner as a trial by the court. They have the same power to grant adjournments as the court upon such trial. If required, they must state the facts found and the conclusions

*The judges of the circuit court are not bound to seal a bill of exceptions, which requires the clerk, to insert therein copies of certain papers after the bill shall have been sealed.—*The Board of Trustees, &c.* vs. *Embree*, 7 Blackf. 461.

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of law separately, and their decision must be given and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict.

Who appointed referees.

SEC. 351. In all cases of reference the parties may agree upon a suitable person or persons, not exceeding three, and the reference shall be ordered accordingly; and if the parties do not agree, the court shall appoint one or more referees, not exceeding three, who shall be free from exception.

New Trials.

In what cases granted.

SEC. 352. A new trial may be granted in the following cases:

First. Irregularity in the proceedings of the court, jury or prevailing party, or any order of court, or abuse of discretion, by which the party was prevented from having a fair trial.

Second. Misconduct of the jury or prevailing party.

Third. Accident or surprise, which ordinary prudence could not have guarded against.

Fourth. Excessive damages.

Fifth. Error in the assessment of the amount of recovery, whether too large or too small, where the action is upon a contract, or for the injury or detention of property.

Sixth. That the verdict or decision is not sustained by sufficient evidence, or is contrary to law.

Seventh. Newly discovered evidence, material for the party applying, which he could not with reasonable diligence, have discovered and produced at the trial.

Eighth. Error of law occurring at the trial, and excepted to by the party making the application. But not more than two new trials shall be granted in the same cause to the same party.*

* He who desires a new trial, must receive it as to the whole case.—*Morris* vs. *The State*, 1 Blackf. 37.

On the trial of a cause, material evidence offered by the defendant was improperly rejected, and there was a verdict against him. The court, in consequence of that mistake, granted a new trial to the defendant, provided he should consent to go to trial on a certain day of the term, or show a good cause for continuance. The defendant refused to comply with the terms, and a judgment was accordingly rendered against him on the verdict. *Held*, that as the verdict was illegal, the judgment rendered upon it was necessarily erroneous. *Held*, also, that under the circumstances of the case, the verdict should have been set aside unconditionally, a new trial granted, and the cause permitted to progress as if no previous trial had taken place. *Heath* vs. *Shelby*, 1 Blackf. 228.

A defendant, after a verdict and judgment against him in assumpsit, filed a bill in chancery for a new trial, on account of newly discovered evidence; averring

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New trial—in case of damages.

In case of damages.

SEC. 353. A new trial shall not be granted on account of the smallness of the damages in actions for an injury to the

that due diligence had been used without effect, to procure the evidence previous to the trial. Held, on demurrer, that the bill would lie.—*Deputy* vs. *Tobias*, 1 Blackf. 311. And see *Doubleday* vs. *Makepeace*, 4 Blackf. 9.

Motions for new trials, on account of newly discovered evidence, are viewed with great caution, and have been uniformly overruled where, with due diligence, the party might previously have had the benefit of the evidence.—*Coe* vs. *Givan*, 1 Blackf. 367.

On a motion for a new trial, on the ground that certain facts can be proved by a witness who was absent, the affidavit of the witness himself should be produced, or its absence accounted for —*Cummins* vs. *Walden*, 4 Blackf. 307. See *Mann* vs. *Clifton*, 3 Blackf. 304.

A new trial will not be granted to a plaintiff, on the affidavit of a witness that he had forgotten, until after the trial, to mention a material fact, invalidating one of the pleas.—*Duignan* vs. *Wyatt*, 3 Blackf. 385.

It is a general rule that a plaintiff, after a verdict against him, cannot claim a new trial on account of his having been surprised by the defendant's evidence.—*Cummins* vs. *Walden*, 4 Blackf. 307.

A new trial should not be granted in an action of tort, on the ground that the damages are excessive, unless they appear at first blush to be outrageous and excessive. — *Picquet* vs. *McKay*, 2 Blackf. 465. See, also, *Sanders* vs. *Johnson*, 6 Blackf. 51.

A verdict in accordance with the weight of the testimony and with justice, ought not to be set aside on account of an erroneous instruction given by the court to the jury.—*Harris* vs. *Doe*, 4 Blackf. 369.

The party against whom erroneous instructions to the jury are given, is entitled to a new trial, without the payment of costs.—*Fisher* vs. *Bridges*, 4 Blackf. 518.

The refusal of the circuit court to grant a new trial, when the question depends merely on the credibility of a witness, will not be considered erroneous.— *Weinsorpflin* vs. *The State*, 7 Blackf. 186.

The granting of a new trial — the record showing no good cause for or against it—is not error —*Nichols* vs. *Smalley et al.*, 7 Blackf. 200.

The plaintiff is not entitled to a new trial on the ground of surprise, occasioned by a witness, whom he called, giving different evidence from that which he expected him to give.—*Graeter* vs. *Fowler et a .*, 7 Blackf. 554.

A party asking for a new trial on account of the discovery of a will material, &c., since the trial, must show that before the trial the will had been searched for in the probate office.—*Robinoe* vs. *Doe d. Colwell et al.*, 6 Blackf. 85.

It is no ground for a new trial, that a witness for the party asking it, who had been excused from testifying on the trial which had taken place because his evidence might subject him to a penalty, has promised to give evidence in the case if a new trial should be granted.—*Lister* vs. *Boker*, 6 Blackf. 439.

A new trial is never granted on account of newly discovered evidence, when, by diligence, the party might have had the benefit of the evidence.—*McIntire et ux.* vs. *Young*, 6 Blackf. 496.

And such trial is rarely, if ever, granted on account of newly discovered evidence, if the only object of the evidence be to impeach the character of a witness. —*Ibid.*

The omission to assess nominal damages, when substantial justice has been done, is no cause for a new trial.—*The State* vs. *Miller et al.*, 5 Blackf. 381.

When a new trial is granted on the payment of costs, the right to a new trial is forfeited, if the costs be not paid.—*Moberly* vs. *Davor*, 5 Blackf. 409.

A verdict should not be set aside for the improper rejection of evidence, if it ought to have been the same had the evidence been admitted.—*Ibid.*

Evidence, though illegal, if admitted without objection, cannot be disregarded on a motion for a new trial.—*Goldsby et al.* vs. *Gentle*, 5 Blackf. 436.

If, before a verdict be agreed upon, one of the jurors separate from his fellows by mistake, and afterwards rejoin them, and there is no room for any unfavorable presumption, the court will not, on that ground alone, award a new trial.—1 Gallis. C. C. R. 360.

If the jury take out with them a deposition, part of which the court had determined to be irrelevant if such irrelevant part had any connection with, or were

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New trial—application—causes discovered after trial.

person or reputation, nor in any other action where the damages shall equal the actual pecuniary injury sustained.

SEC. 354. The application for a new trial must be made at the term the verdict or decision is rendered.

The application

SEC. 355. The application must be by motion, upon written cause, filed at the time of making the motion. The cause mentioned in the second, third and seventh clauses of section 352, must be sustained by affidavit showing their truth.

Causes discovered after trial.

SEC. 356. Where causes for new trial are discovered, after the term at which the verdict or decision was rendered, the application may be made by a complaint filed with the clerk, not later than the second term after the discovery, on which a summons shall issue, as on other complaints, requiring the adverse party to appear and answer it on or before the first day of the next term. The application shall stand for hearing at the term to which the summons is returned executed, and shall be summarily decided by the court, upon the evidence produced by the parties. But no such application shall be made more than one year after the final judgment was rendered.

SEC. 357. The provisions of this code respecting trials by jury, apply, so far as they are applicable, to trials by the court.*

Docketing Actions.

Entry and issue docket.

SEC. 358. The clerk shall keep an entry docket, wherein he shall enter all actions in the order in which they are brought, and the date of issuing the process, and the date of the judgment. Within three weeks after the adjournment of the court, he shall make out an issue docket for all actions then pending; and shall docket therein all cases which may be commenced previous to the first day of the next term, in their order, and furnish a copy of the same for the use of the court.

Actions docketed for each day.

SEC. 359. The clerk shall docket as many actions for each day as, in his opinion, will be disposed of by the court, and

material to the party in whose favor the verdict was rendered, or if the paper had been by him given to the jury to take with them, the court will award a new trial.—4 Wash. C. C. Rep. 148.

When a party has had it in his power to ascertain the importance of evidence, before the hearing of his cause, and has neglected to do so, and to obtain the testimony, a court of equity will not grant a rehearing of the cause, on the ground that the importance of the evidence has been ascertained after the decision of the cause, although the justice of the case might be promoted by it.—Peters' C. C. Rep. 364.

If there be two issues, or issues on two counts, and the verdict be not contrary to evidence applicable to one of them, the court will not grant a new trial, though the verdict be contrary to evidence as to the other.—4 Wash. C. C. Rep. 149.

If the jury take out with them a deposition, part of which was deemed inadmissible by the court, but that part totally inapplicable to the count on which the judgment is given, this is no ground for a new trial.—*Ibid.*

*See ante, R. S. Vol. 2, p. 109.

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they shall be called for trial in their order on the docket. By the agreement of the parties and the consent of the court, any cause may be set for any subsequent day, to be noted on the docket opposite the cause; but any cause so set over, shall be called for trial in its order, as docketed by the clerk, on the day to which it is set over, or as soon thereafter as the business of the court will permit.

Trial of an issue of fact.

SEC. 360. The trial of any issue of fact shall be on or after the day on which the cause is set on the docket, unless otherwise agreed by the parties. The assessment of damages in case of default, shall be on or after the day on which the default is taken.

SEC. 361. The entry on the docket shall show whether or not the summons has been fully served, or notice given, in due time for trial, and whether or not the issues have been formed.

When service is on part of the defendants.

SEC. 362. When the summons has been served in due time on part only of the defendants, the plaintiff may dismiss, or continue, for further proceedings, his action as to those not summoned, or not summoned in time, and proceed to trial as to the others, or continue as to all of them, at his option.

ARTICLE XIX.

Judgments.

Dismissal of actions.

SEC. 363. An action may be dismissed without prejudice:

First. By the plaintiff, before the jury retire; or when the trial is by the court, at any time before the finding of the court is announced.

Second. By the court, where the plaintiff fails to appear on the trial.

Third. By the court, on the refusal to make the necessary parties, after having been ordered by the court.

Fourth. By the court, on the application of some of the defendants, where there are others, whom the plaintiff fails to prosecute with diligence.

Fifth. By the court, for disobedience by the plaintiff, of an order concerning the proceedings in the action. In all other cases upon the trial, the decision must be upon the merits.

Action may be dismissed in vacation.

SEC. 364. The plaintiff may dismiss his action in vacation by filing with the clerk a writing to that effect. The clerk shall enter such written dismissal in the order book, and the court shall enter judgment accordingly at the next term. The plaintiff shall not be liable to the defendant for any costs made by him after notice of the dismissal.

Set-off.

SEC. 365. In any case, where a set-off or counter-claim

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has been presented, which in another action would entitle the defendant to a judgment against the plaintiff, the defendant shall have the right of proceeding to the trial of his claim, without notice, although the plaintiff may have dismissed his action, or failed to appear.*

Judgment vs. any defendant.

Sec. 366. Though all the defendants have been summoned judgment may be rendered against any of them, severally, where the plaintiff would be entitled to judgments against such defendants, if the action had been against them severally.

Failure to answer, and assessment of damages thereafter.

Sec. 367. If the taking of an account, or the proof of a fact, or the assessment of damages is necessary to enable the court to pronounce judgment upon a failure to answer, or after a decision of an issue of law, the court may take the accounts, hear the proof, and, in actions founded on contract, assess the damages, or may refer the same to a commissioner or may direct the same to be ascertained, or assessed by a jury.

Judgment vs. several of the parties.

Sec. 368. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves.

Against one or more.

Sec. 369. In a suit against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.†

Judgt. upon a verdict.

Sec. 370. When a trial by jury has been had, and a general verdict rendered, the judgment must be in conformity to the verdict.‡

Special verdict.

Sec. 371. Where the verdict is special, or where there has been a special finding on particular questions of fact, the court shall render the proper judgment.

Judgt. on the pleadings.

Sec. 372. Where upon the statements in the pleadings one party is entitled by law to judgment in his favor, judgment shall be so rendered by the court, though a verdict has been found against such party.

Set-off—judgt. for excess.

Sec. 373. If a set-off, established at the trial, exceed the plaintiff's claim so established, judgment shall be rendered for the excess; or, if it appears that the defendant is entitled to any other affirmative relief, judgment shall be given therefor. ‖

* See ante, R. S. Vol. 2, p. 39, Sec. 57, and notes.

† When one of two defendants in a suit for a libel pleads the general issue, and the other one on whom process has not been served, does not appear, or does appear, but there is no issue or default as to him, a joint judgment cannot be rendered against the defendants.—*Dunn et al.* vs. *Hall*, 8 Blackf. 32.

See *Bell* vs. *The State*, 7 Blackf. 33; *Hraston et al.* vs. *Fulghum*, 7 Blackf. 101; *Heaton* vs. *Collins*, 7 Blackf. 414; *Smith* vs. *Myers*, 5 Blackf. 223; *Gibbons* vs. *Surber*, 4 Blackf. 155.

‡ See ante, R. S. Vol. 2, p. 114.

‖ See *Hurd* vs. *Earl*, 4 Blackf. 184. See ante, R. S. Vol. 2, p. 39.

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Judgments—possession of personal property—damages—entry.

To recover possession of personal property.

SEC. 374. In an action to recover the possession of personal property, judgment for the plaintiff may be for the delivery of the property, or the value thereof in case a delivery cannot be had, and damages for the detention. Where the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or its value in case a return cannot be had, and damages for the taking and withholding of the property.*

Damages.

SEC. 375. Whenever damages are recoverable, the plaintiff may claim and recover, if he show himself entitled thereto, any damages which he might have heretofore recovered for the same cause of action.†

Entry.

SEC. 376. The judgment must be entered on the order book, and specify clearly the relief granted, or other determination of the action.‡

*See ante, R. S. Vol. 2, p. 54.

†See Appendix, title "Damages," R. S. vol. 2.

‡The judgment of a court in a suit requiring ordinary adversary proceedings, which appears on its face, or may be shown by evidence (in a case where it may be shown) to have been rendered without jurisdiction having been acquired by notice, of the person of the defendant, or without jurisdiction of the subject matter, is void, and may be so treated when it comes in question collaterally.—*Horner et al.* vs. *Doe d. State Bank*, 1 Carter's Ind. Rep. 130.

The judgment of a court of any of the States having jurisdiction of the subject matter, and of the person, is not void, and is not impeachable collaterally, unless for fraud.—*Ibid.*

When the record discloses nothing on the point, jurisdiction of the person and of the subject matter will be presumed, in cases of domestic judgments of courts of general jurisdiction, when they come collaterally in question.—*Ibid.*

Judgments which are not void, are not impeachable collaterally.—1 Carter's Ind. Rep. 396.

In this case, on the first trial, the plaintiff obtained judgment. At the next term of the court, according to the record, the defendants moved for a new trial, which the court granted. Held, that the court could not thus vacate its judgment of a former term.—*Blair et al.* vs. *Russel et al.*, 1 Carter's Ind. Rep. 516.

A judgment without notice is a nullity.—*Wort* vs. *Finley*, 8 Blackf. 335.

An entry of bail for the stay of execution, made after the judgment has ceased to be repleviable, cannot stand as a judgment, or be the foundation of an execution.—*Taylor et al.* vs. *Sanford et al.*, 8 Blackf. 169.

In debt on a bond with a condition, the judgment for the plaintiff was for the penalty, and also for the damages assessed, and costs. Held, that that part of the judgment which was for the damages assessed, was erroneous.—*Armstrong et al.* vs. *The State*, 7 Blackf. 81.

A person cannot sustain a *scire facias* on a judgment which is regular on its face, and which he obtained a term prior to that when the *scire facias* issued.—*Brackenridge* vs. *McCulloch*, 7 Blackf. 334.

As to a judgment *non obstante veredicto*, see *Berry* vs. *Borden*, 7 Blackf. 384.

In an action of debt upon a note the interest ascertained to be due at the time of judgment, ought to be entered as so much damages; and the judgment in such case is, that the plaintiff recover against the defendant the sum of ——— dollars in debt, and the sum of ——— dollars in damages, together with his costs and charges.—*Stevens* vs. *Dunbar*, 1 Blackf. 56.

A judgment rendered for a certain sum in current paper money, is erroneous.—*Duerson et al.* vs. *Bellows*, 1 Blackf. 217.

Debt for 127 dollars. Two counts: the first showing no cause of action, and the second claiming only 27 dollars. Held, that a judgment in favor of

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Judgments—satisfaction of—on demurrer—by confession.

Satisfaction.

SEC. 377. Satisfaction of a judgment, or credits thereon, may be ordered for sufficient cause, upon notice and motion.

Final judgt. on a mortgage.

SEC. 378. It shall not be necessary in any action upon a mortgage, or lein, to give time for the payment of money, or for doing any other act; but final judgment may, in such cases, be given in the first instance.

Foreclosure.

SEC. 379. In the foreclosure of a mortgage, the sale of the mortgaged property shall in all cases be ordered.*

Relief.

SEC. 380. The relief granted to the plaintiff, if there be no answer, cannot exceed the relief demanded in his complaint; but in any other case, the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue.

Judgt. without relief, &c.

SEC. 381. When a judgment is to be executed without any relief from appraisement laws, it shall be so ordered in the judgment. When a plaintiff has included in one action demands, subject to the appraisement laws, with demands made payable without any relief from appraisement laws, the court may render separate judgments upon such demands.

Judgments on Demurrer.

Overruling of a demurrer disregarded when opposed to the merits.

SEC. 382. The judgment upon overruling a demurrer, shall be that the party shall plead over, and the answer or reply shall not be deemed to overrule the objection taken by demurrer. But no objection taken by demurrer and overruled, shall be sufficient to reverse the judgment, if it appear from the whole record that the merits of the cause have been fairly determined. If a party fail to plead after the demurrer is overruled, judgment shall be rendered against him as upon a default.†

Confessing Judgment without Action.

Who may confess.

SEC. 383. Any person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and with the consent of the creditor, or

the plaintiff for the amount claimed by both counts was erroneous.—*Hay et al.* vs. *McCoy*, 6 Blackf. 69.

The judgment in this case not showing against whom it was rendered, the writ of error was dismissed.—*Robinson* vs. *Tousey*, 6 Blackf. 256.

A judgment which is unreversed cannot be objected to as evidence, merely because it is erroneous. Otherwise, if it be a nullity.—*Doe d. Wilkins* vs. *Rue et al.*, 4 Blackf. 263.

In an action in the name of the State, on the relation of A., against B. and C., the judgment was as follows: It is therefore considered by the court, that the said defendants go hence without day, and that *he* also recover his costs and charge in this behalf expended, &c. Held, that under the statute, the judgment should have been against the relator for costs, and in favor of both defendants, but that the mistakes as to these matters were merely clerical, and might have been amended at any time.—*The State* vs. *Hood et al.*, 3 Blackf. 351.

*See post, R. S. Vol. 2, Art. 29, title "Foreclosure of Mortgages," and notes.

†See ante, R. S. Vol. 2, Sec. 50, p. 38.

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person having such cause of action, confess judgment therefor; whereupon, judgment shall be entered accordingly.

Statement of cause of action.

SEC. 384. The debt or cause of action shall be briefly stated in a writing to be filed and copied into the judgment. The confession shall operate as a release of errors.

By power of attorney.

SEC. 385. Whenever a confession of judgment is made by power of attorney or otherwise, the party confessing shall at the time he executes such power of attorney, or confesses judgment, make affidavit that the debt is just and owing, and that such confession is not made for the purpose of defrauding his creditors. The affidavit shall be filed with the court.*

Judgments in Agreed Cases.

Submission of a cause.

SEC. 386. Parties shall have the right in all cases, either with or without process, by an agreement to that effect, to submit any matter of controversy between them, to any court that would otherwise have jurisdiction of such cause, upon an agreed statement of facts, to be made out and signed by the parties; but it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties, whereupon the court shall proceed to try the same, and render judgment as in other cases.

SEC. 387. The statement of the case, the submission and the judgment shall constitute the record.

Judgment.

SEC. 388. The judgment may be enforced in the same manner as if it had been rendered in an action, and in like manner shall be with costs, subject to an appeal, unless otherwise provided in the submission.

Offer to Confess Judgments.

Effect of an acceptance or refusal of an offer.

SEC. 389. The defendant may at any time before the trial, serve upon the plaintiff an offer in writing, to allow judgment to be taken against him for the sum or property, or to the effect, therein specified, with costs. If the plaintiff accept the offer in court, in the presence of the defendant, or give notice of acceptance in writing within five days, and before the trial, judgment shall be entered accordingly. If the offer is not accepted, or notice of acceptance be not given as above directed, the offer is to be deemed withdrawn, and shall not

* In case of a judgment confessed by virtue of a warrant of attorney, the cause of action must be described either in a declaration or in the warrant of attorney.—*Gambia* vs. *Howe*, 8 Blackf. 133.

The record must also show that the execution of the warrant of attorney was duly proved.—*Ibid.*

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be given in evidence, or commented on before the jury; and if the plaintiff fail to obtain a more favorable judgment, the defendant shall recover from the plaintiff the costs occasioned subsequent to the time of the offer.

In case of an action for money.

SEC. 390. Before an action for the recovery of money is brought against any person, he may go into the court of the county of his residence, or of that in which the person having the cause of action resides, and offer to confess judgment in favor of such person for a specified sum on the cause of action. Whereupon, if the person, having had notice that the offer would be made, of its amount and the time and place of making it, ten days before the first day of any term of the court, does not at any such term accept the confession, and should afterwards commence an action upon such cause, and not recover more than the amount so offered to be confessed, he shall pay all costs of the action, and on the trial thereof the offer shall not be deemed to be an admission of the cause of action or amount to which the plaintiff is entitled, nor be given in evidence.

ARTICLE XX.

Defendants Constructively Summoned.

Time for appearance.

SEC. 391. A defendant constructively summoned shall be allowed, at any time before judgment, to appear and defend the action; and upon a substantial defense being disclosed, time may be given on reasonable terms, to prepare for trial.

When statement of complaint taken as true.

SEC. 392. The statements of a complaint against a defendant constructively summoned, and who has not appeared, except such as are for his benefit, shall not be taken as true, but shall be established by proof. But where the plaintiff files with the complaint his own affidavit, stating that any of the allegations thereof, recited in the affidavit are true, and known to be so by the defendant, and that they cannot be proved or shown otherwise than by his answer, so far as the plaintiff knows or believes, such allegations, unless denied by the answer shall be taken as true. And the same rule shall apply to the statements of an answer containing a set-off or counter-claim, and to an affidavit made by the defendant in support thereof, against any plaintiff who will not appear in court for examination.

Plaintiff may be required to answer under oath

SEC. 393. Before rendering judgment against a defendant constructively summoned, and who has not appeared, the court may cause the plaintiff to appear personally in court, or before a commissioner, and answer under oath interrogatories concerning the matters in the complaint or any matters which might be set up in defense thereto, including

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matters of set-off and counter-claim, and may order the examination to be reduced to writing, and filed with the papers of the action.

Set-off.

SEC. 394. If, upon the examination provided in the last section, any matters of set-off or counter-claim are disclosed, the same may be adjusted by the judgment.*

SEC. 395. No personal judgment shall be rendered against a defendant constructively summoned, who has not appeared in the action.

ARTICLE XXI.

Costs.

Who to recover costs.

SEC. 396. In all civil actions the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law.†

When and where if less than $50 be recovered, plaintiff to pay costs.

SEC. 397. In actions for money demands on contract, commenced in the circuit court or court of common pleas, if the plaintiff recover less than fifty dollars, exclusive of costs, he shall pay costs, unless the judgment has been reduced below fifty dollars by a set-off or counter-claim, pleaded and proved by the defendant, in which case the party recovering judgment shall recover costs. When the judgment is reduced below fifty dollars by proof of payments, the defendant shall recover costs.‡

* See ante, R. S. Vol. 2, p. 39, Sec. 57 and notes.

† Congressional townships are not liable for costs.—*Inhabitants of Congressional Township, &c.* vs. *Clark et al.*, 1 Carter's Ind. Rep. 139.

In a suit to enforce a mechanic's lien, the defendants being incumbrancers and not in fault, are not liable for costs.—*Close et al.* vs. *Hunt*, 8 Blackf. 254.

The Governor's pardon of a person convicted of a crime does not discharge the defendant from the costs of prosecution; nor is the Governor authorized to remit the costs in such case.—*The State* vs. *Farley et al.*, 8 Blackf. 229.

If a judgment be reversed, the proceedings back to the first error will be set aside, and the plaintiff in error will have judgment for costs.—*Andrews* vs. *Hammond*, 8 Blackf. 540.

See *Haas* vs. *Flint*, 8 Blackf. 67.

If the defendant, on a demurrer to one of his pleas being overruled, do not ask for a judgment for the costs of issue in law, he cannot assign for error omission of the court to render such judgment.—*Richardson* vs. *The St. Joseph Iron Company*, 5 Blackf. 146.

See title "Fees," R. S. Vol. 1, p. 280.

See *The State* vs. *Abrams*, 3 Blackf. 440, and title "Costs," in that Vol. of Blackf.

‡ If the plaintiff make out on the trial, in proof, a *prima facie* claim to over 50 dollars, he will be entitled to costs, although the effect of the defendant's evidence may be to reduce his right of recovery finally below that sum.—*Ham et al.* vs. *Gregg*, 1 Carter's Ind. Rep. 81.

Action of debt commenced in the circuit court. Two counts: one for less than 50 dollars really due; the other for more, but of which (the general issue being pleaded,) there was no proof. Held, that under the statute of 1838, judgment might be rendered for the plaintiff for the sum claimed in the first

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Costs—relators and corporations—several parties—non-residents.

No more than $5 damages, who to pay costs.

SEC. 398. In all actions for damages solely, not arising out of contract, if the plaintiff do not recover five dollars damages, he shall recover no more costs than damages, except in actions for injuries to character and false imprisonment, and where the title to real estate comes in question.*

Relators, corporations, &c.

SEC. 399. Relators, and persons and corporations for whose use an action is brought, whether such use is shown by the pleadings of the plaintiff or defendant, shall be liable for costs jointly with the actual parties to the action; but when the State is plaintiff, the relator only shall be liable, and judgment for costs shall be rendered accordingly.†

Several plffs. or defendants.

SEC. 400. In actions where there are several plaintiffs, or several defendants, the costs shall be apportioned according to the judgments rendered; and where there are several causes of action embraced in the same complaint, or several issues, the plaintiff shall recover costs upon the issues determined in his favor, and the defendant shall recover costs upon the issues determined in his favor.

When actions might be joined.

SEC. 401. When the plaintiff shall, at the same court bring several actions against the defendant, upon demands which might have been joined in one action, he shall recover costs only in one action, unless it shall appear to the court that the actions affect different rights or interests, or other sufficient reasons exist why the several demands ought not to have been joined in one action.

Non-residents.

SEC. 402. Plaintiffs who are not residents of this State, before commencing any action, shall file in the office of the clerk a written undertaking, payable to the defendant, with surety, to be approved by the clerk, for the payment of all

count, but that the defendant should have judgment for costs.—*Hutchens* vs. *Smith*, 8 Blackf. 122.

Action of assumpsit commenced in the circuit court. Two counts: the first on a note for 40 dollars; the second on an account stated for the same amount. After judgment against the defendant by default, the plaintiff entered a *noll. pros.* as to the second count. Held, that under the statute of 1843, the plaintiff might have judgment for the amount of the note, but that the defendant was entitled to a judgment for costs. --*Stephenson* vs. *Herod*, 8 Blackf. 173.

An action of debt may be brought in the circuit court on a judgment of a justice of the peace, although the demand do not exceed $50, exclusive of interest and costs; but though the plaintiff recover in such case, the defendant is entitled to a judgment for costs.—*Proctor* vs. *Bailey et al.*, 5 Blackf. 495.

* If in trespass *quare clausum fregit* commenced in the circuit court, the plaintiff do not recover $5 in damages, and the title to real estate do not come in question, he recovers no more costs than damages.—*Dodd et al.* vs. *Sheeks*. 5 Blackf. 592. But if in such case the judgment be for less than $5, *with ful costs*, it will be presumed, the record not showing the contrary, that the title to land came in question on the trial.—*Stewart* vs. *Henry et al.*, 5 Blackf. 445.

† In a suit by the State on the relation of a county treasurer, on a collector's bond, the relator is not liable for costs.—*The State* vs. *Lahue et al.*, 7 Blackf. 604.

See same point decided in *Jones et al.* vs. *The State*, 5 Blackf. 141.

The refusal to dismiss a suit of a non-resident for the insufficiency of a bond

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costs which may accrue in the action, to the proper officer or person; but the suit shall not be dimissed for want thereof, if the plaintiff will file, in open court, upon being ordered to do so, such undertaking, which shall include all previous costs; and the sureties shall be liable in the first instance as parties.*

Judgt. for costs. SEC. 403. Whenever in any action, an order shall be made for the payment of any costs at any time before final judgment, the court shall, upon motion of any person interested, render judgment for the costs, in favor of the party entitled to receive the same.

Fee bills. SEC. 404. Fee bills and executions may issue for the collection of costs in the proper cases, against parties to the action, relators, persons for whose use an action is brought, and sureties on undertakings for the payment of costs.

ARTICLE XXII.

Executions.

May issue within five years. SEC. 405. Writs of execution, as now used for the enforcement of judgments, are modified in conformity to this chapter [article,] and any party in whose favor judgment has been

for costs, is not error of which the defendant can complain, if *his* costs are secured by the bond.—*Harding* vs. *Griffin*, 7 Blackf. 462.

In a suit by A. and B. administrators, for the use of C., it was held that A. and B., if non-residents, might be required to give security for costs.—*Griggs* vs. *Vorhies et al.*, 7 Blackf. 561.

A bond for costs filed by a non-resident plaintiff, was for the payment of the costs which had or might accrue in the case, *provided judgment be given against the plaintiff*. Held, that the bond was insufficient.—*Hunt* vs. *Butcher*, 5 Blackf. 341.

On a motion for security for costs, founded on an affidavit under the statute of 1831, neither the examination of witnesses, nor supplemental or counter affidavit, is admissible.—*Scott* vs. *Mortsinger*, 3 Blackf. 189. In case of infancy, see *Bouche* vs. *Ryon*, 3 Blackf. 472.

It was ordered by the circuit court, that a non-resident plaintiff should give security for costs within twenty days, or that the suit should be dismissed. Held, that the court, (the security not having been given according to the order,) might permit the plaintiff at the next term, to file the bond for costs.—*Freeman* vs. *Hukill*, 4 Blackf. 9.

The plaintiff, in the case of an appeal from a judgment of a justice of the peace in his favor, was a non-resident when the cause was called in the circuit court. Held, that he might be required to give security for costs, though he was a resident when he commenced the suit, when the judgment was rendered, and when the appeal was taken.—*Malaby* vs. *Hinkston*, 4 Blackf. 127.

If at the term to which a rule on a non resident plaintiff to give security for costs is returnable, the defendant, without noticing the rule plead to the merits and go to trial, he waives the benefit of the rule.—*Lindley et al.* vs. *Kindall*, 4 Blackf. 189. As to a suit on a bond for costs, see *Glidewell et al.* vs. *McGaughy*, 2 Blackf. 359.

The security need not be given till required by the defendant.—*Cox* vs. *Hunt*, 1 Blackf. 146.

The failing to give such surety before the commencement of suit is not of itself sufficient cause for continuance.—*Ibid.*

A plaintiff in error, if a non-resident, may be required to give security for costs.—*Hurlow* vs. *Becktle*, 1 Blackf. 215.

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Executions—after five years, when to issue.

heretofore or shall hereafter be rendered, may, at any time within five years after the entry of judgment, proceed to enforce the same as prescribed in this chapter [article.] *

After 5 years execution only to issue upon motion.

SEC. 406. After the lapse of five years from the entry of judgment, an execution can be issued only on leave of court, upon motion, after ten days' personal notice to the adverse party, unless he be absent, or non-resident, or cannot be found when service of notice may be made by publication, as in an original action; or in such other manner as the court shall direct; such leave shall not be given, unless it be established by the oath of the party, or other satisfactory proof, that the judgment, or some part thereof, remains unsatisfied and due.

When a certified copy of judgment may be served.

SEC. 407. When a judgment requires the payment of money, or delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this chapter [article;] where it requires the performance of any

* If, between the times of rendition of judgment and the issuing of an execution, an execution-defendant fraudulently conveys all his property to a third person, and it is afterwards levied upon to satisfy the execution, he is not entitled to hold 125 dollars' worth of said property exempt from execution, neither can he, on the refusal of the officer to release to him that amount, maintain trover therefor against said officer and execution-plaintiff.—*Mandlove et al.* vs. *Burton*, 1 Carter's Ind. Rep. 39.

An execution issued after the year without revival, cannot, upon that ground, be avoided in a collateral suit, by one who was not a party to it.—*Doe* vs. *Harter*, 1 Carter's Ind. Rep. 427.

On a judgment against several joint defendants, an execution may issue without an affidavit indorsed thereon, that the defendants have not sufficient property in the county in which they reside to satisfy said judgment, to any county in which any one of the defendants may reside.—*Ibid.*

An officer levying on personal property, must use ordinary diligence in preserving it. He may entrust such property to the care of a servant, or the execution-defendant, who is required to use the same degree of diligence, and the officer is liable for his negligence.—*State ex. rel. Bennet et al.* vs. *Nelson*, 1 Carter's Ind. Rep. 522.

If property levied upon by an officer, be carried off by high water, and that fact would excuse him from selling it to make the money on the execution, it would be proper for him to return such fact as the reason for not selling the property.—*Ibid.*

The right of a judgment-plaintiff by law to take out a *fi. fa.* within a certain time, cannot be affected by a subsequent statute.—*Dormire et al.* vs. *Cogly*, 8 Blackf. 177.

As to the construction of the statute of 1838, concerning the issue and levy of executions, see *Raub et al.* vs. *Heath*, 8 Blackf. 575.

A judgment-creditor, having sued out an execution, may abandon it before it is executed, and sue out another of a different sort. So, if part only of the judgment be levied, and the execution be returned, the plaintiff may have another writ of the same or a different sort, at his election, for the residue.—*Steele* vs. *Murray*, 1 Blackf. 179.

If an execution improvidently issue—for example, a *fi. fa.* without a judgment, or while the defendant's real estate is held by a *venditioni exponas*—it will be set aside on motion at law, due notice of the motion having been given. But a court of chancery will not interfere, except to stay the proceedings when necessary, until the motion can be heard.—*Lasselle* vs. *Moore*, 1 Blackf. 226.

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other act, a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby, or by law, to obey the same, and his obedience thereto enforced; if he refuse, he may be punished by the court as for contempt.

Three kinds of executions.

SEC. 408. There shall be three kinds of execution—one against the property of the judgment-debtor, one against his person, and one for the delivery of the possession of real or personal property, or such delivery, with damages, for withholding the same.

Execution against the body.

SEC. 409. No execution against the body shall be issued, while an execution against the property remains unreturned, nor shall an execution against the property be issued while there is an execution against the body unreturned.

When may issue to any county.

SEC. 410. When the execution is against the property or body of the judgment-debtor, it may be issued to the sheriff of any county in the State. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof, is situated.

Requisites of an execution.

SEC. 411. The execution must issue in the name of the State, and be directed to the sheriff of the county, sealed with the seal, and attested by the clerk of the court. It must intelligibly refer to the judgment; stating the court where, and the time when rendered, the names of the parties, the amount, if it be for money, and the amount actually due thereon, and shall require the sheriff substantially, as follows.

Against the property.

First. If it be against the property of the judgment-debtor, it shall require the sheriff to satisfy the judgment out of the property of the debtor, subject to execution.

Against property in the hands of an administrator, &c.

Second. If it be against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment out of such property.

Against the body.

Third. If it be against the body of the judgment-debtor, it shall require the sheriff to arrest such debtor and commit him to the jail of the county until he shall pay the judgment, or be discharged according to law.

To deliver possession.

Fourth. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto; and may at the same time require the sheriff to satisfy any costs, damages, or rents and profits, recovered by the same judgment out of the property of the party against whom it was rendered, subject to execution, and the value of the property for which the judgment was recovered to be specified therein, if a delivery thereof cannot be had,

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and shall, in that respect, be deemed an execution against property.

SEC. 412. The execution shall be returnable within one hundred and eighty days from its date.

Lien. SEC. 413. When an execution against the property of any person is delivered to an officer to be executed, the goods and chattels of such person within the jurisdiction of the officer, shall be bound from the time of the delivery; but if there be several executions, whether issued out of a court of record, or by a justice of the peace, against the same defendant, in the hands of different officers, that execution, without regard to the time of its delivery, under which the first levy is made, shall have the preference, and all liens created by the prior delivery of any other execution, shall be divested in favor of the execution first levied.*

Bonds payable to the State. SEC. 414. Judgments on bonds payable to the State of Indiana, shall bind the real estate of the debtor from the commencement of the action.

Indorsement. SEC. 415. The sheriff receiving an execution shall indorse thereon the year, month, day and hour when he received it.

In case of a surety. SEC. 416. If it appear upon the face of an execution, or by the indorsement of the clerk, that of those against whom it issued, any one is surety for another, the property of the

* When the judgment-debtor is not the owner of land at the time of the rendition of several judgments, but afterwards acquire it, each judgment becomes a lien at the same instant that the land is thus acquired, as if they had all been rendered at the same time; and, in such case, the execution first issued and levied, has preference.—*Michaels* vs. *Boyd*, 1 Carter's Ind. Rep. 259.

A *fieri facias* was levied on the dower estate of the defendant. The court set the levy aside on the ground that the personal property had not first been demanded. The order setting aside the levy contained a provision that the execution should be a lien on the personal property. A *venditioni exponas* issued directing the sale of the dower estate, and before sale the defendant died insolvent. The plaintiff filed his bill to compel the appropriation of the entire assets of the estate to the payment of his debts, and the bill was dismissed on demurrer. Held, that he had no lien on the personal property, and the bill was properly dismissed.—*Jeans et al.* vs. *Anderson*, 1 Carter's Ind. Rep. 492.

A *fieri facias* binds the goods of the debtor from the time it is delivered to the sheriff, though the latter fail to indorse on it the time of such delivery.—*Johnson* vs. *McLane*, 7 Blackf. 501.

After A. and B. had exchanged horses, a *fi. fa.* against the former was delivered to the sheriff; and after such delivery A. and B. re-exchanged horses. The sheriff afterwards levied the execution on both horses as A.'s property. Held, that such levy was not a relinquishment of the lien of the execution on the horse originally owned by B.—*Ibid.*

A *fieri facias* in A.'s favor was delivered to the sheriff, but, before it was levied, another in favor of B. was delivered to a constable and levied. A.'s execution was then levied on the same property. Held, that if B.'s execution be duly proceeded in, to a sale, it has the preference; but if, instead of being so perfected, it be recalled, the lien of A.'s execution stands in force.—*McCall* vs. *Trevor*, 4 Blackf. 496.

A sale of goods by an execution-defendant, though *bona fide* and for value, if made after the delivery of the execution to the sheriff, does not affect the lien of the execution.—*Ibid.*

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principal shall be first sold, unless the surety shall direct otherwise.

When may issue on Sunday.

SEC. 417. An execution may be issued and executed on Sunday whenever an affidavit shall be filed by the plaintiff, or some person in his behalf, stating that he will lose his judgment, as he has reason to fear and believe, unless process issue on that day.

SEC. 418. The clerk shall indorse on such execution that the defendants are not privileged from service on Sunday.

Successor to complete proceedings on an execution.

SEC. 419. If the sheriff die, or go out of office, before the return of any execution, his successor, or other officer authorized to discharge the duties of the office in such case, shall proceed thereon in the same manner that the sheriff should have done.

Stay of Execution.

Length of stay.

SEC. 420. When judgment has been rendered against any person for the recovery of money or sale of property, he may, by procuring one or more sufficient freehold sureties, to enter into a recognizance, acknowledging themselves bail for the defendant for the payment of the judgment, together with the interest and costs accrued, and to accrue, have a stay of execution from the time of signing the judgment, as follows:

First. If the sum for which judgment was rendered, inclusive of costs, do not exceed six dollars, for thirty days.

Second. If such sum and costs exceed six, and do not exceed twelve dollars, sixty days.

Third. If such sum and costs exceed twelve, and do not exceed twenty dollars, ninety days.

Fourth. If such sum and costs exceed twenty, and do not exceed forty dollars, one hundred and twenty days.

Fifth. If such sum and costs exceed forty, and do not exceed one hundred dollars, one hundred and fifty days.

Sixth. If such sum and costs exceed one hundred dollars, one hundred and eighty days. *

Recognizance.

SEC. 421. The bail, for stay of execution, may be taken and approved by the clerk, and the recognizance entered of record, at any time before the term of stay of execution expires. The undertaking in the recognizance shall be for the payment of the judgment, interest, and costs that may accrue at or before the expiration of the term of the stay of exe-

* An entry of bail for the stay of execution after the judgment has ceased to be repleviable, cannot stand as a judgment, or be the foundation of an execution.—*Taylor et al.* vs. *Sanford et al.*, 8 Blackf. 169.

Decrees in chancery were repleviable under the act of 1843.—*Harris* vs. *Cobb et al.*, 7 Blackf. 493.

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Stay of execution—notice—return—when no stay allowed.

cution. The recognizance shall be written immediately following the entry of the judgment, and signed by the bail.

Clerk to notify sheriff, when.

SEC. 422. When the bail is entered after execution issued, the clerk shall immediately notify the sheriff of the stay, and he shall forthwith return the execution, noting his doings thereon.

Indorsement.

SEC. 423. When execution issues for want of bail, before the term for stay expires, the clerk shall indorse thereon the date of the judgment, and that the same is repleviable.

Stay for residue of term.

SEC. 424. In such case the defendant may have a stay of execution, for the residue of such term, by putting in bail to be approved by the sheriff, and indorsed thereon, and signed by the bail.

Return.

SEC. 425. The sheriff having taken the bail, shall immediately return the execution, with his doings thereon, to the clerk's office, and the recognizance shall be copied by the clerk in the execution docket, and shall have the same force as if taken by the clerk.

Property to be relinquished.

SEC. 426. All property levied on before stay of execution, and all written undertakings for the delivery of personal property to the sheriff, shall be relinquished by the officer, upon bail for the stay of execution being entered.

To have the effect of a judgment.

SEC. 427. Every recognizance of bail, taken as above provided, shall have the effect of a judgment confessed, from the date thereof, against the person and property of the bail.

Joint execution against principal and bail to be issued, when.

SEC. 428. At the expiration of the stay, it shall be the duty of the clerk to issue a joint execution against the property of all the judgment-debtors, and replevin-bail; but the sheriff shall first levy upon the property of the judgment-defendants, if sufficient can be found; if not, he shall then, without delay, levy the execution upon the property of the bail. But no property of the bail shall be sold while property of the original judgment-debtor, subject to the execution, can be found in the county.

When no stay allowed.

SEC. 429. No stay of execution shall be allowed upon any judgment recovered against any officer, person or corporation, or the sureties of any of them, for money received in a fiduciary capacity, or for a breach of any official duty. The clerk shall issue execution upon such judgments forthwith, returnable in ninety days, and indorsed "not repleviable," and it shall be so ordered in the judgment.

In case sureties ask it, no stay allowed.

SEC. 430. When any court shall render judgment against two or more persons, any of whom are sureties for any other or others in the contract, on which the judgment is founded, there shall be no stay of execution on the judgment, if the sureties object at the time of rendering the judgment, and it shall be so ordered by the court, unless the bail for the stay of execution will undertake specially to pay the judgment, in

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case the amount thereof cannot be levied of the principal defendant.

Bail may have execution, when.

SEC. 431. Any bail for the stay of execution may file with the clerk an affidavit, stating that he verily believes he will be liable for the judgment, interest, and costs thereon, unless execution issues immediately; and the clerk shall thereupon issue execution forthwith, unless other sufficient bail be entered before the clerk or sheriff, as in other cases.

Other bail.

SEC. 432. If other sufficient bail be entered, it shall have the force of the original bail entered before the filing of the affidavit, and shall discharge the original bail.

Levy.

Levy.

SEC. 433. When an execution against the property of any person is issued to the sheriff, he shall proceed without unreasonable delay to levy the same upon the property, rights, credits and effects of the defendant.*

* A carding machine situated in a building erected for the purpose of carrying on carding—ready to be put in operation, and standing on the floor in its usual place of operation, but not fastened to the building—is personal property, and subject to an execution issued by a justice of the peace.—*Taffe* vs. *Warnick*, 3 Blackf. 111.

If a sheriff take and sell the property of A. on an execution against B., he is liable to the owner, in trespass or trover, without demand.—*Jamison* vs. *Hendricks*, 2 Blackf. 94. Replevin would lie in such case. See *Chinn* vs. *Russell*, 2 *Id.* 172.

As to the power of an officer to break open doors, see the following cases quoted in 4 Blackf. 18.

In the case in the text, the plaintiff could not deny all the allegations in the plea, by the general replication of *de injuria sua propria absque tali causa*; because the execution, which is a matter of record, could only be denied by a replication of *nul tiel record*. But the plaintiff might, after admitting or protesting the execution, have replied *de injuria sua propria absque residuo causæ*; and such a replication would have put the defendants on the proof that the horses of the execution-debtor were in the plaintiff's stable, and that the sheriff, and the defendants by his command, entered and seized the horses under the execution.—*Lucas et al.* vs. *Nockells*, 10 Bingh. 157.

The sheriff may break open the *outer door* of a barn or out house, detached from the dwelling house, in order to execute a *fieri facias*, even without making a demand that the door should be opened. *Penton* vs. *Browne*, 1 Sid. 181, 186. Wats. on Sheriffs, 173. Smith's Lead. Cas. 45. In a leading case respecting the sheriff's right to break open doors, the following points are resolved:

1. The house of every one is to him as his castle and fortress, as well for his defense against injury and violence, as for his repose.

2. When any house is recovered by any legal action or by *eject. firmæ*, the sheriff may break the house and deliver the seisin or possession to the demandant or plaintiff.

3. When the king is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him or to do other execution of the process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open the doors.

When the door is open, the sheriff may enter the house and do execution, at the suit of any subject, either of the body or of the goods; but the sheriff cannot, (on request made and denial,) at the suit of a common person, break the defendant's house, *&c.*, to execute any process at the suit of any subject.

The house of any one is not a castle or privilege but for himself, and does not extend to protect any person who flies to his house, or the goods of any other

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Levy—coin—bills, &c.—goods assigned or mortgaged—shares of stock.

Coin.

SEC. 434. Current coin may be levied upon and returned on execution, without sale, as so much money collected.

Bills, notes, drafts, &c.

SEC. 435. Bills, notes, drafts and checks, or other evidences of debt, issued by any moneyed corporation, or bank, or by this State or the United States, and circulating as money, may be levied upon as personal property, and sold on execution.

Goods assigned, or mortgaged.

SEC. 436. Goods and chattels pledged, assigned or mortgaged as security for any debt or contract, may be levied upon and sold on execution against the person making the pledge, assignment or mortgage, subject thereto, and the purchaser shall be entitled to the possession, upon complying with the conditions of the pledge, assignment or mortgage.

Shares of stock.

SEC. 437. Shares of stock in any corporation or company, may be levied on and sold in the county where the office and books, showing the shares of stock and stockholders of the corporation or company, are kept; and the sheriff shall transfer the stock, subject to the rights of the corporation or company. The sheriff shall have access to the books of any corporation or company in his county for the purpose of making the levy, and, if refused access, the court shall enforce the right. The shares of stock subject to be levied upon, shall be bound by the execution from the time of the levy, and when such levy is made the sheriff shall leave the notice

which are brought into his house, to prevent a lawful execution and to escape the ordinary process of law.—*Semayne's* case, 5 Coke's Rep. 91.

If the defendant, after an arrest on civil process, escape to the house of a stranger, or to his own house, the officer may, upon fresh pursuit, break open the *outer* door in order to retake him. And, in criminal cases, the *outer* door of the house of the defendant or a stranger may be broken open by the officer, in order to arrest the defendant in the first instance. Foster's Cr. Law, 319, 320. So, also, such door of a stranger's house may be broken, for the purpose of levying an execution on the defendant's goods, if they be fraudulently concealed there.—Wats. on Sheriffs, 59, 174.

In the cases, whether criminal or civil, in which the sheriff may break open the *outer* door of a dwelling house, either of the defendant or of a stranger, to execute process, a demand of admission should first be made.—*Burdett* vs. *Abbott*, 14 East, 1, 163; *Lannock* vs. *Brown et al.*, 2 Barn. & Ald. 592; Foster's Cr. Law, 319, 320; *Hutchison* vs. *Birch*, 4 Taunt. 619.

The *inner* door of a house, though it be the door of a lodger's room, and cupboards, trunks, &c., may be broken open by an officer, even in civil cases, to execute the duty of his office, without any demand that they should be opened.—*Lee* vs. *Gansel*, Cowp. 1; *Hutchison* vs. *Birch*, supra.; *Lloyd* vs. *Sandilands* 8 Taunt. 250.

The sheriff enters the house of a stranger at his peril. If the defendant or his goods be not found there, the sheriff is a trespasser. It is otherwise, however, if the sheriff enter the defendant's own house. He may not find the defendant or his goods there, and still justify the entry. And it is held, that under a *fieri facias* against the goods of an intestate, in the hands of his administratrix, or of her husband and her, in her right since the marriage—the sheriff may justify an entry into the husband's house to search for goods of the intestate, though none be found there, that being the most natural custody for them.—*Cooke* vs. *Birt*, 5 Taunt. 765.

On the subject of this note, *vide* Smith's Leading Cases, 39 and notes.—*State* vs. *Thackam et al.*, 1 Bay's Rep. 358; *State* vs. *Smith*, 1 New Ham Rep. 346; *Haggerty* vs. *Wilber*, 16 Johns. Rep. 227; 1 East's Cr. Law, 321 to 324.

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thereof with the officers of the company, and such levy shall constitute a lien upon such stock from the time of such levy.

Any debt when given up.

SEC. 438. Any debt or thing in action, legally or equitably assignable, may be levied upon, when given up by the defendant, and sold on execution, in the same manner as other personal property. *

Sale of debt.

SEC. 439. The sheriff making the sale of any such debt, or thing in action, shall assign and deliver the same to the purchaser, and the assignment shall have the same effect as if made by the execution-defendant at the time of making the levy thereon, and shall be treated as so made.

Action upon debt.

SEC. 440. In any action in which such assignment is declared upon or stated, it shall not be necessary to plead or prove any judgment or execution, by virtue of which the sale was made, nor to prove the execution of the assignment, unless the same be denied under oath.

Property designated by deft. to be first levied on.

SEC. 441. When any execution shall issue against the real or personal property of any person, it shall be the duty of the sheriff to levy the same first upon that part of the property designated by such person, if there be no reasonable doubt that he is the owner thereof, and if designated in time to enable the sheriff to levy and sell without unnecessary delay.

SEC. 442. If no property be thus designated, it shall be the duty of the sheriff to levy the execution upon any property of the debtor which can be found, subject to execution.

When the property designated is insufficient.

SEC. 443. If the property thus designated shall be insufficient to satisfy the execution, the sheriff shall levy the same upon such other property, subject to execution, as can be most readily found, sufficient, in addition to the property designated, to satisfy the execution.

Personal estate to be first levied on.

SEC. 444. In all cases where the personal estate of the debtor, subject to execution, is insufficient to satisfy the execution, the real estate shall be exempt from levy and sale until the personal estate is levied upon and sold, unless the debtor shall direct otherwise, and the principal messuage, lands or tenements of the debtor, or upon which he may reside, shall not be levied upon unless other property cannot be found sufficient to satisfy the execution in the hands of the sheriff.

* A note for the payment of money cannot, without the defendant's assent, be taken and sold on execution.—*Johnson* vs. *Crawford*, 6 Blackf. 377.

A. deposited a note for the payment of money against C., to be accounted for by B. to A., when collected. B. afterwards gave up this note to the sheriff, to be sold on a fee bill against A., B. and D., in a case in which A. was the principal, and B. and D. were his sureties. The sheriff accordingly levied upon and sold the note, to satisfy the fee bill. Held, that B., for this breach of duty, was liable to A. in an action on the case. Held, also, that a note for the payment of money is not liable to execution.—*McClelland* vs. *Hubbard*, 2 Blackf. 361.

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Appraisement—by two householders—liens.

Appraisement.

Two-thirds. SEC. 445. No property shall be sold on any execution or order of sale issued out of any court, for less than two-thirds of the appraised cash value thereof, exclusive of liens and incumbrances, except where otherwise provided by law. *

SEC. 446. The sheriff, immediately upon levying an execution, shall proceed to ascertain the cash value of such personal property.

Two householders to be selected. SEC. 447. For that purpose two disinterested householders of the neighborhood where the levy is made shall be selected as appraisers, one of whom shall be selected by each of the parties or their agent; or, in the absence of either party or his agent, or upon the refusal of either party, after three days' notice by the sheriff to make the selection, the sheriff shall proceed to select the appraisers. They shall forthwith proceed to appraise the property according to its cash value at the time, deducting liens and incumbrances; and in case of their disagreement as to the value, they shall select a like disinterested appraiser, and with his assistance shall complete the valuation, and the appraisement of any two of them shall be deemed the cash value.

SEC. 448. In case any appraiser shall fail to act or to complete such valuation, another shall be chosen in his stead, as above provided.

Liens, &c. SEC. 449. It shall not be the duty of the sheriff or appraisers to ascertain the amount of liens and incumbrances; but either party may furnish the sheriff with a list thereof, with the amount and nature of each.

* An appraisement of land on which an execution had been levied, certified by two appraisers selected by the sheriff (it not appearing that a third appraiser had been appointed and had acted,) was held not to be warranted by the act of 1841. Held, also, that an appraisement in such case by appraisers selected by the sheriff under the act of 1843 was not good, unless it appeared that the contingency mentioned in that act had happened.—*Harrison et al.* vs. *Stipp*, 8 Blackf. 455.

It was held that land sold after the passage of the act of 1842, on execution on a judgment which was rendered in 1841 on a contract the date of which did not appear, was correctly valued under the appraisement law of 1841.—*Hunt* vs. *Gregg*, 8 Blackf. 105.

Suit in chancery by A. and B. against C. and D. for the sale of D.'s equitable interest in lot No. 10 and part of lot No. 11, with a house thereon, in Indianapolis, for the payment of debts. Decree ordering the property to be sold as other lands were sold under execution, or so much thereof as should be necessary to pay the claims of A., B. and C.; the proceeds to be applied first to the payment of C.'s claim. Held, that as the debt due C. was first to be paid, the property should be appraised and sold according to the law in force when that debt was contracted.—*Harrison et al.* vs. *Stipp*, 8 Blackf. 455.

A decree in chancery rendered in 1841 for a certain sum was replevied in the same year, and a *fi. fa.* afterwards, in 1842, was issued against the principal and bail. The execution was levied on certain land, which was appraised under the act of 1843. Held, that the sheriff could not justify his not selling the land, on the ground that it would not sell for the appraised value agreeably to the last named act.—*Caldwell et al.* vs. *Sheffer*, 8 Blackf. 116.

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Sheriff to furnish schedule.

SEC. 450. The sheriff shall furnish the appraisers a schedule of the property levied on, with the incumbrances made known to him, and they shall proceed to fix and set down opposite to each tract, lot or parcel of real estate, and of the several articles of personal property, the cash value, deducting liens and incumbrances, which schedule they shall return to the sheriff.

Oath of appraisers.

SEC. 451. The appraisers shall take and subscribe an oath annexed to such appraisement, to the effect that the property mentioned in the schedule is, to the best of their judgment, worth the sums specified therein; that the same is the fair cash value thereof at the time, exclusive of liens and incumbrances; which oath the sheriff is authorized to administer and attest, when taken and subscribed by the appraisers.

Property sold subject to liens.

SEC. 452. When any property shall be sold subject to liens and incumbrances, the purchaser may pay the liens and incumbrances, and hold the property discharged from all claims of the execution-defendant; or, he may hold the property subject to be redeemed by the execution-defendant, his heirs or assigns, by paying to the purchaser, his heirs or assigns, the purchase money, with interest; when redeemed the purchaser shall have the growing crops, and shall not be accountable for rents and profits, but he shall account for waste.

Property unsold

SEC. 453. When any property levied on remains unsold, it shall be the duty of the sheriff when he returns the execution, to return the appraisement therewith, stating in his return the failure to sell, and the cause of the failure.

Lien to continue in such case.

SEC. 454. The lien of the levy upon the property, shall continue, and the clerk, unless otherwise directed by the plaintiff, shall forthwith issue another execution, reciting the return of the former execution, the levy and failure to sell, and directing the sheriff to satisfy the judgment out of the property unsold, if the same is sufficient; if not, then out of any other property of the debtor, subject to execution.

Property may be re-offered.

SEC. 455. Whenever any property levied upon remains unsold for want of buyers, the plaintiff may cause the same to be re-offered at any time before the return day of the execution, at his costs, as often as he may direct; but in case of the sale of the property, the costs of such offer and sale shall be taxed against the defendant. Each party may have one re-valuation of the property, at his costs, after the first offer to sell.

SEC. 456. Property conveyed by a debtor with intent to hinder, delay, or defraud creditors shall be sold without appraisement.

Delivery Bonds.

When property may be returned

SEC. 457. Any personal property taken in execution, may be returned to the execution-defendant by the sheriff, upon the

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Delivery bonds—non-delivery—return—action and recovery on bond.

delivery by the defendant to him, of a written undertaking, payable to the execution plaintiff, with sufficient surety to be approved by the sheriff, to the effect that the property shall be delivered to the sheriff at a time and place named in the undertaking, to be sold according to law, or for the payment to the sheriff of the appraised value thereof, or when the same has not been appraised, then of the fair value of the same.

Property to be first appraised.

SEC. 458. Before the sheriff shall deliver any part of the property to the defendant, he shall cause it to be appraised in the manner prescribed by law, when an appraisement thereof is required, and the defendant may sell or dispose of the property, paying the officer the full appraised value thereof.

In case of non-delivery.

SEC. 459. In case of the non-delivery, of the property according to the undertaking, it shall be the duty of the sheriff to levy upon and sell the same, or any other property of the defendant, as soon as practicable, at any time before the return day of the execution.

Return "forfeited."

SEC. 460. Upon a forfeiture of the written undertaking, the officer shall forthwith return it indorsed "forfeited," to the clerk's office, for the use of the plaintiff.

Action and recovery on bond.

SEC. 461. Such undertaking shall be valid in law, and an action had thereon whenever the condition thereof is broken, and on recovery, the value of the property so taken, with damages not exceeding ten per cent. on such value, shall be assessed in favor of the plaintiff. But the recovery shall not exceed the amount due on the execution, and ten per cent. on the principal. *

* As to the averments necessary in a declaration, and other pleadings in a suit on a delivery bond, see *Strange et al* vs. *Lowe et al.*, 8 Blackf. 243; *Lovejoy et al.* vs. *Bright*, 8 Blackf. 206; *The State* vs. *Jones et al.*, 8 Blackf. 270; *Miller et al.* vs. *Ashton*, 7 Blackf. 29; *Atkinson et al.* vs. *Starbuck*, 7 Blackf. 420.

In an action on a penal bond conditioned for the delivery of property in a certain time and place, the declaration need not aver a demand of the property at the place.—*Mitchell* vs. *Merrill*, 2 Blackf. 87. See also, *English* vs. *Finicey*, 5 Blackf. 298.

The officer executing the writ and taking the delivery bond is a competent witness to prove the value of the property, in an action on such bond.—*Chinn* vs. *Perry*, 2 Blackf. 268.

A bond conditioned for the delivery of goods taken on execution was in the usual form, except that it did not state to whom the property was to be delivered. Held, that the legal effect of the condition of the bond that the property should be delivered at the time and place specified, was, that it should be then and there delivered to the sheriff. Held, also, that a declaration in a suit on such bond, setting out the condition, &c., should aver that the property had not been delivered to the sheriff.—*Eldridge* vs. *Yantes*, 6 Blackf. 72.

Declaration in debt by an execution-plaintiff on a delivery bond, payable to the sheriff, conditioned for the delivery of the property on a certain day. Suggestion on the record, that the bond is defective in not being made payable to the plaintiff. Breach, that the property was not delivered on the day specified in the condition, nor at any other time since the execution of the bond. Held, on general demurrer, that the declaration was good.—*Hawkins* vs. *Johnson*, 3 Id. 46. See *Evans* vs. *Shoemaker*, 2 Blackf. 237. *Thompson* vs. *Wilson*, 1 Id. 358.

A declaration in detinue may be objectionable on general demurrer, if it do

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Execution.

SEC. 462. On judgment obtained on such written undertaking, execution shall issue forthwith, without stay, returnable in thirty days; and the sheriff shall not return any property to the execution-defendant levied on thereby, except upon payment of the judgment.

Sales.

Rents and profits.

SEC. 463. The estate or interest of the judgment-debtor in any real estate, shall not be sold on execution, until the rents and profits thereof, for a term not exceeding seven years shall have been first offered for sale at public auction; but if the same shall not sell for a sum sufficient to satisfy the execution, then the estate or interest of the judgment-debtor shall be sold by virtue of the execution.*

SEC. 464. Rents and profits may be sold as other property, the appraisers setting down the value of each year separately.

SEC. 465. So many years, not exceeding such term of seven, shall be sold as will satisfy the execution, and no more; and the sheriff shall execute a lease to the purchaser for the term sold.

not aver the value of the property; but the averment of value in trespass or trover, or in suits on contracts for the delivery of property, is only matter of form.—*Hawkins* vs. *Johnson*, 3 Blackf. 46.

If, in a suit on a delivery bond, the plaintiff obtain judgment on a demurrer to the declaration, the damages must, in the absence of any agreement of the parties, be assessed by a jury.—*McKay* vs. *Craig*, 6 Blackf. 168. *Thompson* vs. *Wilson*, 1 Id. 358.

The damages against the defendant in such suit cannot be for more than the value of the property agreed to be delivered, the costs and ten per cent. damages.—*Campbell* vs. *Woolen*, 5 Blackf. 80.

It is no defense to a suit on a delivery bond, that the officer who took it made a false and fraudulent representation to the defendant respecting the time when the property was to be delivered, and that the bond was not read to or by the defendant.—*Secright* vs. *Fletcher*, 6 Blackf. 380.

An execution-defendant may waive the benefit of the condition in a delivery bond, which is prescribed by statute, and which permits him to sell the property at private sale, and when sold, pay the appraised value thereof.—*Patterson* vs. *Brown*, 1 Carter's Ind. Rep. 567.

In a suit on a delivery bond, damages should not be given on costs.—*Ibid.*

* A judgment was rendered in the Ripley circuit court on the 28th of February, 1843, in a suit on contract made in the State of Illinois on the 14th of October, 1839. The debtor's land was sold under an execution on the judgment. Held, (in case where the execution law of Illinois was not proved) that the sale must be governed by the laws of this State.—*Doe d. Holman* vs. *Collins*, 1 Carter's Ind. Rep. 24.

The statutes of one State, unless proved, will not be noticed by the courts of any other State.—*Ibid.*

Quære, whether the courts of our State are bound to give effect to the execution laws, though proved, of other States.—*Ibid.*

The execution law of 1843, (the contrary not being shown) must be presumed to have been in force in Ripley county when said judgment was rendered.—*Ibid.*

A sale of land on execution (the execution law of 1843 being in force when the judgment was rendered and the sale made,) without appraisement, and for less than its fair value, though the purchaser had not actual notice of the irregularity is void.—*Ibid.*

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Sale on execution.

Real estate, sale of.

SEC. 466. Real estate, taken by virtue of any execution, shall be sold at public auction at the door of the court house of the county in which the same is situated; and if the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale, than shall be necessary to satisfy the execution, unless the same is not susceptible of division. *

* A sheriff sold a tract of land, susceptible of division, worth $20,000, on execution, for 75 dollars. There were but four persons present at the sale. Held, that the sheriff should have offered the land in separate parcels, and it was his duty to have exercised a sound discretion, and should not have struck off the property for a merely nominal sum. — *Sherry* vs. *Nick of the Woods*, 1 Carter's Ind. Rep. 575.

If the land be struck off at sheriff's sale to a bidder, but the land be not conveyed by the sheriff, nor the purchase money paid, the execution-debtor's title to the land is not divested, nor is the judgment satisfied by the sale.—*Chapman et al.* vs. *Harwood*, 8 Blackf. 82.

To make the contract in such case valid, under the statute of frauds, a memorandum in writing must be made of it at the time the land is struck off.—*Ibid.*

If in case of such sale, the sheriff should convey the land, without receiving the purchase money, the conveyance would be void.—*Ibid.*

If after the sheriff has levied an execution on a tract of land, the execution-debtor lay off the land into town lots, the sheriff will not be bound, on the mere request of such debtor, to sell the lots separately. — *Kiser* vs. *Ruddick et al.*, 8 Blackf. 382.

A sheriff, by virtue of a *fieri facias*, sold certain real estate for more than sufficient to satisfy the execution. At the time of sale, he had other executions in his hands against the same debtor, on judgments younger than that under which the sale was made. These younger judgments were for a larger amount, in the aggregate, than the balance of the purchase money after payment of the execution on which the sale was made. Held, that the whole of the purchase-money should be paid to the sheriff, and that he should satisfy the judgments according to the order of time in which they were rendered. — *Steel* vs. *Hanna et al.*, 8 Blackf. 326.

When a sheriff has in his hands several executions, (the laws as to a sale under them being different.) and the real estate levied on is divisible, it seems that he should commence with the execution first to be satisfied, and sell enough of the property under the law governing such sale, to satisfy that execution; and that he should afterwards sell under the other executions in their order, according to the same rule, until all are satisfied, or the property is exhausted. But if the property is not susceptible of division, it should be sold under the execution first to be satisfied.—*Harrison et al.* vs. *Stipp*, 8 Blackf. 455.

A judgment was rendered by the circuit court of Sullivan county in favor of the plaintiff, for a certain sum of money. An execution was afterwards issued on the judgment, directed to the sheriff of said county. The sheriff levied the execution on the debtor's land in Vigo county, and sold it by virtue of the execution. Held, that such levy and sale were void. — *Stephenson* vs. *Doe d. Wait et al.*, 8 Blackf. 508.

The sale of real estate by virtue of an execution upon a judgment on contract, must be governed by the law in force when the contract was made. — *Stewart* vs. *Vermilyea*, 8 Blackf. 56.

Same point decided as to sale of both real and personal property in *Lane et al.* vs. *Fox*, 8 Blackf. 58; also, in *Harrison et al.* vs. *Stipp*, 8 Blackf. 455.

As to the authority of the State Bank to purchase real estate on execution for the benefit of particular branches, see *Sherry et al.* vs. *Denn d. State Bank*, 8 Blackf. 542.

If a *fieri facias* be levied on real estate, and the defendant die before the completion of the execution, the sheriff may afterwards proceed to advertise and sell the land.—*Doe d. Wolf et al.* vs. *Heath et al.*, 7 Blackf. 154.

If a bidder at sheriff's sale of real estate prevent others from bidding, by representations respecting the object of his bid, and then buy the property at

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Sale on execution—notice thereof.

Notice of sale of real estate.

SEC. 467. The time and place of making sale of real estate, on execution, shall be publicly advertised by the sheriff, for at least twenty days successively next before the day of

the sale at a price much below its value, the sale is void, as against public policy, and as a fraud upon the judgment-debtor and his creditors.—*Bunts* vs. *Cole et al.*, 7 Blackf. 265.

A purchaser of land at a sheriff's sale, under a judgment against a person who had conveyed the land to defraud his creditors, stands in the place of a creditor of the fraudulent grantor, and has the same rights.—*Scott* vs. *Purcell et al.*, 7 Blackf. 66.

An execution-debtor paid to the sheriff the amount due, except a small balance, which could not then be ascertained, and promised to pay that when called on. The sheriff afterwards, by virtue of the execution, on which fifteen dollars and twenty-five cents were due, without calling on the debtor, sold one hundred acres of land, worth fiffeen or twenty dollars an acre, for three hundred and fifty-one dollars and twenty-five cents. Held, that the sale was an abuse of the sheriff's powers, and would be set aside by a court of chancery, though a court of law would not interfere.—*Reed* vs. *Carter*, 1 Blackf. 410.

A purchaser of land at sheriff's sale is not obliged to show that the debtor had not personal property to satisfy the judgment. It is only necessary for him to show the judgment of a competent court, and the kind of execution which authorizes the sheriff to sell. He has a right to presume that all the intermediate proceedings are correct.—*Frakes* vs. *Brown*, 2 Blackf. 295.

If the purchaser of real estate at sheriff's sale be the execution-plaintiff, he is considered a purchaser with full notice, and accountable for all irregularities.—*Harrison* vs. *Doe*, 2 Blackf. 1; *Doe* vs. *Smith*, 4 *Id.* 228; *McClure* vs. *McCormack*, 5 *Id.* 129.

A sheriff's deed may be admissible as evidence, though it recite incorrectly the amount of the execution under which the sale was made; a particular recital of the execution not being necessary to the validity of the deed.—*Doe* vs. *Rue*, 4 Blackf. 263.

If land be sold on execution which, as to the amount, varies from the judgment, the purchaser, or person claiming under him, may have the execution amended by the judgment.—*Ibid.*

A mistake in the amount of an execution is amendable at any time, by the judgment.—*McCall* vs. *Trevor*, 4 Blackf. 496.

If an execution be proved to be lost, its contents may be proved by parol evidence.—*Nooe* vs. *Higdon*, 4 *Id.* 184.

A sheriff's deed is good against the execution-defendant and his heirs or devisees, though it be not acknowledged or recorded.—*Dixon* vs. *Doe*, 5 *Id.* 106.

A sale of real estate on execution cannot be objected to because it was made after the execution was returnable, the levy having been made before that time.—*Tillotson* vs. *Doe d. Gregory et al.*, 5 Blackf. 590.

An execution-debtor gave up to the sheriff certain land to be sold. The sheriff, instead of selling that land, levied on the other land belonging to the debtor, and sold it on the execution. Held, that the purchaser's title was not affected by the sheriff's not having first sold the land surrendered by the debtor.—*Ibid.*

The propriety of the sheriff's conduct in selling the whole instead of a part of a town lot, is a proper subject of inquiry, and evidence of the divisibility and value of the lot is admissible in action of ejectment by the execution-debtor against a person claiming under the purchaser at the sheriff's sale.—*Doe d. Maguire* vs. *Smith*, 4 Blackf. 228.

The plaintiff in such case, in order to impeach the defendant's title, may prove that when the sheriff sold the lot, it was known to the purchaser and to the defendant that the rents and profits had not been offered for sale.—*Ibid.*

Upon an execution for $80, the sheriff sold a quarter section of land for 567 dollars, and conveyed the same to the purchaser. Ten years afterwards the execution-defendant, without showing any cause for his delay, objected to the sale for having been so made. Held, that the sale, under these circumstances,

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sale, by posting up written or printed notices thereof, in three of the most public places in the township in which the real estate is situated; and a like advertisement at the door of the court house of the county, and, also, by advertising the same for three weeks successively in a newspaper printed nearest to the real estate, if any such newspaper be printed within the jurisdiction of the sheriff.

Notice of sale of personal property.

SEC. 468. Previous notice of the time and place of the sale of any personal property on execution, shall be given for ten days successively, by posting up written notices thereof in at least three of the most public places in the township where the sale is to be made.

Sale of personal property.

SEC. 469. Personal property shall not be sold unless the same shall be present and subject to the view of those attending the sale; and it shall be sold at public auction in such lots and parcels as shall be calculated to bring the highest price.

Other levies.

SEC. 470. If the property levied on shall not sell for a sum sufficient to satisfy the execution, the sheriff shall make a further and sufficient levy, if sufficient property can be found, and proceed as upon the first levy, and return his doings thereon.

Other executions.

SEC. 471. The clerk, upon the return of an execution unsatisfied, shall issue another execution upon the judgment, and indorse thereon the amount of money levied, by the former, if any.

Sheriff's deed.

SEC. 472. Upon the sale of real estate by virtue of an execution, and the payment of the purchase money, the sheriff making the sale, or in case of his death or going out of office, his successor, or any officer authorized to discharge the duties of the office, shall execute and deliver to the purchaser a deed of conveyance for the premises, which shall be valid and effectual to convey all the right, title and interest of the execution-debtor therein to the purchaser, except any right of redemption as provided by law.

Deed to heirs or devisees.

SEC. 473. In case the purchaser of any real estate upon execution, having paid the purchase money therefor, shall die

might be considered on demurrer to evidence, to have been made in good faith. —*Doe d. Wilkins* vs. *Rue et al.*, 4 Blackf. 263.

A judgment-debtor cannot set up a title in a third person to defeat a purchaser under the judgment.—*Hobson* vs. *Doe d. Harper et al.*, 4 Blackf. 487.

A sheriff, by virtue of an execution on which about 20 dollars were due, sold 100 acres of land belonging to the execution-defendant, worth from 1000 to 2000 dollars, when four or five acres, which might have been conveniently taken from one side of the tract, could have been sold for a sufficient sum to satisfy the execution. Held, on a bill filed by the execution-debtor, that the sale was fraudulent and void.—*Reed et al.* vs. *Carter*, 3 Blackf. 376.

The purchaser of land, at a sheriff's sale, to which land the execution-debtor had no title, but which belonged at the time to the United States, can recover from the debtor, in equity, the amount of the purchase money paid to the sheriff, though no fraud in relation to the sale be imputed to the debtor.—*Muir* vs. *Craig*, 3 Blackf. 293.

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before a deed of conveyance shall have been executed to him, the sheriff shall convey such real estate to the heirs or devisees of the deceased person.

Penalty for selling without notice, &c.

SEC. 474. Any sheriff who shall sell any real estate without giving the previous notice herein directed, or shall sell the same otherwise than in the manner herein prescribed, shall forfeit and pay to the party injured, not less than ten, nor more than two hundred dollars, in addition to such other damages as the party may have sustained, to be recovered from the sheriff, or from him and his sureties in an action on his official bond.

Sheriff not to purchase.

SEC. 475. If any sheriff or his deputy, making sale of property on execution, shall directly or indirectly, purchase the same, the sale shall be void.

Purchaser failing to pay purchase money.

SEC. 476. Whenever the purchaser of any property, sold on execution, shall fail or refuse to pay the purchase money, he shall be liable, on motion to be made by the sheriff, or the execution-plaintiff, in the proper court, five days' notice being given, to a judgment for the amount of the purchase money, and damages not exceeding ten per cent. and interest, with costs, and no stay of execution shall be allowed upon the judgment.*

*If the execution-plaintiff buy land at sheriff's sale at a price exceeding the amount of the execution, and refuse to make payment, the sheriff may, by motion against the purchaser, recover the excess with ten per cent. damages thereon.—*Hunt* vs. *Gregg*, 8 Blackf. 105.

A sheriff's notice of an intended motion against the purchaser of land on execution to recover the purchase money, need not state that the contract was in writing.—*Ibid.*

Sales of land on execution are within the statute of frauds; and the sheriff's return of the execution stating fully the terms of the contract, if made immediately on striking off the property, will bind the purchaser under the statute; but a return subsequently made will not have that effect.—*Ibid.*

A sheriff cannot proceed by motion to recover the purchase money of land sold on execution, unless he has previously offered the purchaser a deed for the land, provided he would pay the purchase money.—*Ibid.*

There is an irregularity in such case in going to trial without an issue.—*Ibid.*

It is questionable whether an action at common law can be sustained by a sheriff on a contract of sale on execution effected through his own agency in the capacity of an auctioner. But the objection, if valid to a common law suit in such case, is not applicable to the form of action by motion, which is expressly authorized by statute whenever the sheriff makes a valid sale on execution, and the purchaser refuses to pay his bid.—*Ibid.*

The notice by a sheriff to a purchaser of land on execution, of a motion to be made for judgment against such purchaser for the purchase money, need not set out the sheriff's return to the execution.—*Steele* vs. *Hanna et al.*, 8 Blackf. 326.

If land be sold on execution and the creditor receive the purchase money, the purchaser cannot recover back the money from the creditor, merely because the debtor had no title to the land.—*Dunn et al* vs. *Frasier*, 8 Blackf. 452.

But the debtor in such case is liable to the purchaser for the purchase money.—*Ibid.*

A purchaser of land on execution having failed to pay the purchase money, the sheriff afterwards sold the land to another person for a less price than it first sold for. Held, that in the statutory proceeding by notice and motion against the first purchaser for the difference in the amount between the first

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Sheriff may re-expose—return by mail—penalty for neglect.

Sec. 477. Or the sheriff may re-expose and sell the property, on the same or any subsequent day, according to law, and if the amount bid at the second sale, shall not equal the amount bid at the first sale, and the costs of second sale, the first purchaser shall be liable for the deficiency, and damages thereon, not exceeding ten per cent., and interest and costs, to be recovered by a like notice and motion as provided in the last section. Sheriff may re-expose to sale.

Sec. 478. When any execution shall be issued to any county, other than the one in which the judgment is rendered, return may be made by mail; but money cannot be thus sent, except by the direction of the party entitled thereto, or his attorney. Return by mail, when.

Sec. 479. When property shall be sold on execution for more than will satisfy the execution, including interest and costs, the sheriff shall pay the overplus to the execution-debtor of whom it was levied, or to his assigns. Overplus to be paid debtor.

Sheriff to pay over money—His liability and return.

Sec. 480. When the sheriff has collected any money on execution, he shall pay over the same at the earliest opportunity, unless enjoined.

Sec. 481. If any sheriff shall neglect or refuse to levy upon or sell any property, justly liable to execution, when the same might have been done, he shall be amerced to the value of such property, not to exceed the amount necessary to satisfy the execution. Penalty for neglect.

Sec. 482. If any sheriff shall neglect or refuse to return any execution, as required by law, or shall make a false return thereon, he shall be amerced in such amount as he might and should have levied by virtue of the execution. * Failure to return.

and second sales, the notice must aver an offer by the sheriff to convey the land to the defendant before the second sale.—*Williams* vs. *Lines*, 7 Blackf. 46.

The statute of 1838 required, that the motion for judgment against a purchaser of property on execution, who had failed to pay for the same, should be made, not by the execution-creditor, but by the officer who made the sale.—*Laverty et al.* vs. *Chamberlain*, 7 Blackf. 556.

If a purchaser of real estate at sheriff's sale refuse to pay the purchase money, and the property be sold for a less sum at a second sale, the liability of the first purchaser for the difference, under the statute of 1825, may be established by parol evidence.—*Cowgill* vs. *Wooden*, 2 Blackf. 332.

A sheriff sold certain real estate, on execution, to B., who failed to pay the purchase money. A few days afterwards, without having adjourned the sale, and without advertising it again, the sheriff re-exposed the property to sale, and sold it to C., who had notice of the facts. Held, that the sale to C. was void.—*Givan* vs. *Doe d. Crawford et. al.*, 5 Blackf. 260.

* The title of a purchaser of real estate at sheriff's sale, who pays the purchase money and receives the sheriff's deed, cannot be affected by the circumstance that the return of the execution is imperfect, or that none was made.—*Doe d. Wolf et al.* vs. *Heath et al.*, 7 Blackf. 154.

If the sheriff be guilty of mal-practice in the discharge of his duty relative to

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Failure to pay over—penalty—motion against delinquent—return.

Failure to pay over.

SEC. 483. If any sheriff shall neglect or refuse, on demand, to pay over any money collected on execution, to the execution-creditor, his agent or attorney, or to the execution-debtor, when he is entitled thereto, he shall be amerced to the amount thus withheld.

Additional penalty.

SEC. 484. In all cases specified in the last three sections, the plaintiff shall in addition to the amercement, recover of the officer, legal interest and damages, not exceeding ten per cent. on the principal sum recovered.

Motion against delinquent sheriff.

SEC. 485. Such recovery may be had by motion, against the officer, in the proper court, ten days' notice thereof being given, or by action on the bond of the sheriff. The proceedings in this section contemplated, may be commenced immediately upon the default of the sheriff either before or after the return day of the execution.

Return.

SEC. 486. Every execution shall be returned forthwith, upon being satisfied by the collection of the money; also, upon order of the plaintiff or his agent indorsed thereon.

an execution, the court may, upon an attachment for contempt, commit him to prison, or amerce him, and then refuse to discharge him or remit the fine, unless he make satisfaction to the judgment-creditor.—*The State* vs. *Tipton*, 1 Blackf. 166.

When it appears by the sheriff's return of an execution that he has levied the money, he and his sureties are liable to an action for it, without a previous demand.—*Ibid.*

In an action against a sheriff for a false return, the execution is admissible in evidence, though it do not specify a day on which it is returnable.—*Bosley* vs. *Farquar*, 2 Blackf. 61.

Neither the insolvency of the execution-defendant, nor the statute of limitations, can be pleaded in bar to an action against a sheriff for a false return of a *fieri facias*.—*Stevens* vs. *Beckes*, 3 Blackf. 88.

An execution-plaintiff cannot recover on a sheriff's bond, in the case of an escape, unless he shows a judgment against the execution-defendant.—*The State* vs. *Beem*, 3 Blackf. 222. See *The Governor* vs. *Stribling*, 2 Blackf. 24.

Debt on sheriff's bond against the principal and his sureties. Breach, the sheriff's failure to return an execution in favor of the relator, &c. Two pleas, as follows: 1. That when the execution came to the sheriff's hands, the execution-defendant had no property within the sheriff's bailiwick, whereof to make the money, or any part of it, but was then, and still continued to be, notoriously insolvent. 2. That at the time when the execution came to the sheriff's hands, and at the time when it should have been returned, viz., on, &c., the relator had no interest in the execution, or the judgment on which the same issued, nor was he entitled to any part of the money due thereon, &c. Held, that these pleas were bad on general demurrer. Held, also, that the declaration was bad, it containing no averment of a judgment on which the execution issued.—*The State* vs. *Spencer*, 4 Blackf. 310.

The sheriff's return to a *fieri facias* was, that he had not levied because the plaintiff would not give him an indemnity. Held, that this return was unknown to the law, and that the cause must stand as if no return were made.—*Bosley* vs. *Farquar*, 2 Blackf. 61.

Even if such indemnity could be required in any case, it should be demanded as soon as the circumstances authorizing the demand were known to exist.—*Ibid.*

If the sheriff, in consequence of vague rumors as to whether certain goods are the debtor's or not, return *nulla bona*, without having the right of property tried by a jury, he will be liable for a false return, on proof that the goods were subject to the execution.—*Ibid.*

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When the return day of an execution falls on Sunday, it shall be returned on the following Monday.

When property of a non-resident is sold, plaintiff to give bond.

SEC. 487. When the sheriff has sold the property of a non-resident, or other person upon an execution issued on a judgment recovered against him in a case where publication is provided for, and no personal notice of the pendency of the action was given to such defendant, the plaintiff shall not be entitled to receive any of the proceeds of such sale, until he has filed in the clerk's office a written undertaking, with surety, to be approved by the clerk, to the effect that he will refund the money about to be received by him, or so much thereof as shall be necessary, if the judgment shall afterwards be annulled or set aside, and the defendant shall show that the plaintiff's claim is unfounded in whole or in part. But surety to refund shall not be required in cases of attachment.

Death of def't.

SEC. 488. The death of the defendant, after the execution is placed in the hands of the sheriff to be executed, shall not affect his proceedings thereon, except that the amount of property, allowed absolutely to the widow of the decedent, shall be exempt from levy and sale under such execution.

Executions against the Body.

SEC. 489. No execution shall be issued upon any judgment against the body of any execution-debtor, except as hereinafter provided.

Affidavit.

SEC. 490. Before any such execution shall issue, the plaintiff shall file with the clerk an affidavit, charging the debtor with fraudulently concealing, removing, conveying or transferring his property, subject to execution, with intent to defraud and delay the plaintiff, or charging that the debtor has money, rights, credits or effects, with which the judgment, or some part thereof, might be paid, and which he fraudulently withholds, or conceals, with a view to delay or defraud the creditor.

Finding of jury.

SEC. 491. The affidavit need not designate, specifically, any property, moneys or effects, fraudulently removed, transferred, concealed, conveyed or withheld by the debtor; but the jury or court, in determining the matters in issue between the parties, if the finding be for the creditor, shall designate, in the finding, the moneys, effects, property, debts or things in action subject to execution, which have been thus removed concealed, transferred, conveyed or withheld, and the value thereof.

Notice.

SEC. 492. Upon the filing of the affidavit, the clerk shall issue a notice, requiring the debtor to appear at the next term of the court, and show cause why such execution should not issue against him.

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Executions against the body--special bail—recognizance.

Notice or return of "not found."

SEC. 493. After ten days' notice, or after the return of two notices of "not found," the court shall hear and determine the matters and things contained in the affidavit.

Debtor not appearing.

SEC. 494. If the debtor shall fail to appear and show cause, the court may hear and determine the same in the absence of the debtor, or a jury for that purpose may be impanneled, if desired by the creditor.

Debtor appearing.

SEC. 495. If the debtor appear and plead to the affidavit any sufficient matter to bar the issuing of the execution, and an issue be taken thereon, the same may be tried by the court, or a jury, as in other cases.

Execution.

SEC. 496. If the issue be determined against the debtor, the court, unless good cause be shown, shall forthwith order an execution against his body, subject to the rules and restrictions of the next two sections.

Surrender of property, no execution.

SEC. 497. If the debtor shall surrender such moneys, effects, property, debts or things in action, to the use and for the benefit of the creditor, or pay the value thereof, as found by the court or jury, no execution shall for that cause be issued against his body.

Failure to surrender.

SEC. 498. If the debtor fail to surrender or pay, as provided in the preceding section, upon the return of such finding, an execution shall forthwith issue against his body upon the judgment.

Service.

SEC. 499. The execution against the body shall be served by arresting the defendant, and, unless discharged by due course of law, committing him to the common jail of the county.

Affidavit for special bail.

SEC. 500. If the creditor show in his affidavit, that the debtor has not been held to special bail in the original action, or, having been thus held, has been surrendered by his bail, and that he has reason to fear, and does fear, that such debtor will leave the State before the trial and determination of the matters alleged in the affidavit, an order of arrest and bail shall issue against the debtor, and be served and returned, as in other cases.

Recognizance.

SEC. 501. The debtor, when arrested on the order of arrest, may enter into a recognizance, with sufficient surety, for his appearance at the trial of such proceedings, and for the surrender of his body if an execution be awarded.*

* W. having separate judgments on their joint and several promissory note against T. and L., issued a *fi. fa.* on the judgment against L. which was levied on certain real estate. Whilst the execution was in the sheriff's hands, C. entered into a recognizance as bail in the case on the order book of the circuit court. Held, that W. had his election to collect his money by an execution on the recognizance, if valid, or by an execution on the judgment against L. Held, also, that if the recognizance was objectionable, C.'s remedy was by motion, on the common law side of the circuit court, to set it aside.—*Waynick et al.* vs. *Connelly*, 8 Blackf. 75.

See title "Special Bail," Civil Code, R. S. Vol. 2, p. 51.

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Executions against the body—insolvents discharged from custody.

Form, return, force and effect of recognizance

SEC. 502. The sheriff may take the recognizance in the form and by the rules provided in other cases for order of arrest and bail, either before or after the debtor is committed to prison, and shall return the same to the proper court. The recognizance shall have the same force as in other cases, and all subsequent proceedings may be had thereon by the parties and persons interested, as are provided in cases of arrest and bail.

Female, or soldier of revolution.

SEC. 503. No female, or soldier of the revolution, shall be imprisoned upon any order of arrest and bail, or upon an execution against the body.

Insolvents Discharged from Custody.

Delivery of property, and oath of debtor.

SEC. 504. Any person arrested or imprisoned on execution may discharge himself from custody by delivering to the sheriff a sufficiency of property, either real or personal, to discharge the debt or damages due on the execution, together with the interest and costs thereon; or by delivering to the sheriff all the property, both real and personal, which he may have, not included in the finding of the court or jury, subject to execution, if any, together with the property, credits and effects included in the finding of the court or jury, and all his choses in action, if any, exceeding, with other property retained, the amount exempt by law from execution. He shall also make oath that he has no more or other property, either real or personal, subject to execution, and that he has no moneys, rights, credits or effects in his possession, or under his control, or in the possession, or under the control of any other person for his use, exceeding, with other property retained, the amount exempt from execution, and that he has neither directly nor indirectly, disposed of, transferred, or concealed, any of his property, rights, credits, moneys, or effects, nor confessed or suffered any judgment with intent to delay or defraud any of his creditors.*

Sheriff to take prisoner before an officer.

SEC. 505. For the purpose of enabling the defendant to take the oath, it shall be the duty of the sheriff, upon the prisoner's request, to take him before some person authorized to administer an oath, who shall reduce the oath to writing, explain it to the prisoner, and cause him to be sworn to and subscribe it, and, having certified the oath, deliver it to the sheriff, who

* A discharge, with the plaintiff's consent, of a defendant in custody on a *capias ad satisfaciendum*, operates as a discharge of the judgment. *Aliter*, if the discharge from custody be on account of the plaintiff's non-payment of the jailor's fees.—*Prentiss* vs. *Hinton*, 6 Blackf. 35.

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shall make it a part of his return, by appending it to the execution.*

Notice to creditor.

SEC. 506. The execution-creditor shall be notified of the time and place at which the oath will be taken; the notice shall be served upon the creditor, or his agent or attorney, by the sheriff, if the creditor, his agent or attorney reside in the county; and, if neither reside in the county, the sheriff shall post up the notice in the clerk's office five days.†

Creditor may examine prisoner.

SEC. 507. When the oath is administered, the execution-creditor, his agent or attorney, may propound to the prisoner any relevant question touching his property, moneys, rights, credits and effects, and the person administering the oath shall reduce the questions and answers to writing, and forthwith file the same with the clerk.

Discharge.

SEC. 508. When the prisoner has strictly complied with the foregoing provisions, he shall be discharged.‡

* It is the magistrate's duty before whom the debtor makes oath in order to be discharged under the statute of 1838, to reduce the oath to writing, cause the debtor to sign it, and hand it over to the officer making the arrest, who should make it part of his return, and append it to the writ.—*Webster* vs. *Farley*, 6 Blackf. 163.

A defendant in custody on a *ca. sa.* may be discharged without prejudice, under the act of 1841, by the attorney at law for the plaintiff.—*Neff et al.* vs. *Powell et al.*, 6 Blackf. 420.

† Debt against the sheriff for an escape on execution. Plea, that the execution defendant being in custody, &c., made oath that he had no property, &c.; that before the oath was administered, the plaintiff not being resident in the county, the defendant posted up in the clerk's office a written notice of the time and place of taking the oath; and that the execution defendant was thereupon discharged, &c. Held, that the plea was insufficient for not stating that the plaintiff had no agent or attorney in the county, and for not showing that the notice contained the name of the officer before whom the oath was taken.—*Wells* vs. *Rawlings*, 6 Blackf. 28.

‡ If one of two defendants taken on a *ca. sa.* jointly, be discharged from prison in consequence if the plaintiff's refusal to pay for his support, that does not operate as a discharge of the judgment.—*Tatem* vs. *Potts et al.*, 5 Blackf. 534.

A debtor was discharged under an insolvent law of Ohio, as to the imprisonment of his person, from a debt due the payee on a promissory note. The parties resided in Ohio, and the debt was there contracted. Held, that the debtor might plead the discharge, so far as respected the imprisonment of his person, in bar of an action brought against him in this State on the note by the assignee thereof.—*Pugh* vs. *Bussel*, 2 Blackf. 366.

A. having become indebted to B. in the State of Ohio, where they both resided, gave his note to B. for the debt, dated in 1821. In 1823, the parties being still resident in Ohio, A. took the benefit of the insolvent law of that State, and was discharged, so far as respected arrest and imprisonment, from all his debts, that of B among the rest. Afterwards A. removed to this State; and, to an action against him on the note, brought by C., the assignee of B., he pleaded, in discharge of his person from arrest and imprisonment for the debt, his above mentioned discharge in Ohio. Held, that the plea was good. —*Pugh* vs. *Bussel*, 2 Blackf. 394.

Until Congress exercise the right of passing a uniform law of bankruptcy, any State may enact a bankrupt law not impairing the obligation of contracts. —*Ibid.*

A State law merely discharging the person of the debtor from imprisonment, not his after-acquired property, for debts contracted in the State, is constitu-

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Insolvents discharged from custody—execution and judgment dockets.

Disposition of property.

SEC. 509. Any property given up by the person under arrest shall be disposed of by the sheriff in the same manner as property taken on execution against property.

Return.

SEC. 510. The sheriff shall make return of all his doings therein, the discharge of the debtor and the sale of the property, according to the facts, to the court.

If the prisoner die.

SEC. 511. The arrest of any person who may die while in custody, shall not discharge the judgment, or any lien upon property, but the same may be enforced by any legal proceedings.

An escape.

SEC. 512. Any person escaping from custody may be retaken by the same or a new execution against his body, or his property may be proceeded against in the same manner as if his body had never been taken in execution.

Execution and Judgment Dockets.

Judgment docket.

SEC. 513. The clerk of every court of record shall keep a docket, in which he shall enter, within thirty days after each term of the court, in alphabetical order, a statement of each judgment rendered at such term, containing:

First. The names at length of all the parties.

Second. The amount of the judgment and costs, and date of its rendition.

Third. If the judgment be against several persons, the statement shall be repeated under the name of each defendant in alphabetical order.

Recognizances, how entered.

SEC. 514. Recognizance of bail for stay of execution shall be entered in such docket immediately after the taking or return thereof, specifying the judgment, and its amount, the date of the recognizance and names of the bail.

SEC. 515. Such docket shall be a record, and open during the usual hours of transacting business, to the examination of any person desiring it.

Penalty for neglect in not entering judgment, &c.

SEC. 516. Every clerk, neglecting to enter any judgment or recognizance, as herein required, shall be liable to any person injured, for the amount of damages sustained by such neglect, to be recovered in an action against the clerk alone, or upon his official bond, against him and his sureties.

tional, whether the debt was contracted before or after the passage of the law. But, if the law discharge the debtor's after-acquired property, a discharge under it is not valid, unless the creditor make himself a party to the proceedings.—*Ibid.*

A discharge by a State law, has no operation out of the State over contracts not made and to be carried into effect within the State; nor over the citizens of other States, who do not make themselves parties to the proceedings under the law.—*Ibid.*

A discharge under an insolvent law, of the person, may be pleaded in discharge of the person from imprisonment; and the judgment for the plaintiff, if the plea be supported, is, that he recover his debt, &c., to be levied not on the person, but only on the property of the defendant.—*Ibid.*

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Execution docket.

SEC. 517. The clerk of every court of record shall keep an execution docket, in which he shall enter all executions, as they are issued by him, specifying, in proper columns, the names of the parties, the amount of the judgment, and the interest due at the issuing of the execution, and the costs; and prepare an additional column, in which he shall enter at length the return of the sheriff; and such docket entries shall be taken and deemed to be a record.

ARTICLE XXIII.

Proceedings supplementary to Execution.

Execution to another county returned unsatisfied, court to order defendant to appear.

SEC. 518. When an execution against the property of the judgment-debtor, or any of several debtors in the same judgment, issued to the sheriff of the county where he resides, or if he do not reside in the State, to the sheriff of the county where the judgment is rendered, is returned unsatisfied, in whole or in part, the judgment-creditor, after such return is made, shall be entitled to an order, to be issued by any court of record of the county to which such execution issued, or by the clerk thereof in vacation, requiring the judgment-debtor to appear forthwith before the court, if in session; if the court is not in session, then before the judge thereof at a time and place to be specified therein, or on the first day of the next term of the court, to answer concerning his property within the county, to which the execution was issued.

When the debtor has property which he refuses to apply to debt.

SEC. 519. If, after the issuing of an execution against property, the execution-plaintiff or other person in his behalf, shall make and file an affidavit with the clerk of any court of record of any county, to the effect that any judgment-debtor residing in such county has property, describing it, which he unjustly refuses to apply towards the satisfaction of the judgment, the court, if in session, or the judge or clerk thereof in vacation, shall issue an order requiring the judgment-debtor to appear forthwith before the court, if in session; if not, at the next term of the court, or before the judge thereof, at a time and place to be specified therein, to answer concerning the same; and such proceedings may thereafter be had for the application of the property of the judgment-debtor towards the satisfaction of the judgment, as provided upon the return of an execution.

When debtor conceals himself, &c.

SEC. 520. When the plaintiff, his agent or attorney shall, at the time of applying for the order, or at any time afterwards, make and file his affidavit with the court, or the clerk thereof in vacation, that there is danger of the debtor leaving the State or concealing himself, and that there is reason to believe he has property, rights, credits, moneys or

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effects, which he unjustly refuses to apply to the judgment, with intent to defraud the creditor, the court shall issue to the sheriff of the county an order of arrest and bail.

Recognizance.

SEC. 521. The sheriff, having taken the execution-debtor into custody upon the order of arrest, shall require him to enter into a written undertaking to the plaintiff, with surety to be approved by the officer, that he will attend before the court or judge thereof, as required, and abide such order as may be made; and that he will not, in the meantime, dispose of any part of his property not exempt from execution. In default thereof he shall be committed to prison; and, upon breach of such undertaking, the plaintiff shall have his remedy thereon to the amount of the value of the property unlawfully withheld or disposed of.

Other persons may be required to answer touching property of debtor.

SEC. 522. After the issuing or return of an execution against the property of the judgment-debtor, or any one of the several debtors in the same judgment, and upon an affidavit that any person or corporation has property of such judgment-debtor, or is indebted to him in any amount, which, together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law, such person, corporation, or any member thereof, may be required to appear and answer concerning the same as above provided.

Witnesses and examination of parties.

SEC. 523. Witnesses may be required to appear and testify in the proceeding provided for in this chapter [article]; and either party may examine the other as a witness in the same manner as upon the trial of an issue; or the plaintiff may waive the answer of the debtor, and rely upon other testimony. All such examinations and answers shall be on the oath of the party, except that when a corporation answers, the answers shall be on the oath of an officer thereof.

Order of the court.

SEC. 524. Upon the hearing, the judge of the court may order any property of the judgment-debtor, not exempt from execution, in the hands either of himself or any other person or any debt due to the judgment-debtor, to be applied to the satisfaction of the judgment, and forbid transfers of property and choses in action, and such judge or court shall have full power to enforce all orders and decrees in the premises, by attachment or otherwise.

Costs.

SEC. 525. Costs shall be awarded and taxed in this proceeding as in other cases.

ARTICLE XXIV.

Real Estate subject to judgment and execution—Sales and restitution thereof.

What real estate liable to judgment.

SEC. 526. The following real estate shall be liable to all judgments and attachments, and to be sold on execution

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against the debtor owing the same, or for whose use the same is holden, viz:

First. All lands of the judgment-debtor, whether in possession, reversion or remainder.

Second. Lands fraudulently conveyed with intent to delay or defraud creditors.

Third. All rights of redeeming mortgaged lands; also, all lands held by virtue of any land office certificate.

Fourth. Lands, and any estate, or interest therein holden by any one in trust for, or to the use of another.

Fifth. All chattels real of the judgment-debtor.

Lien of judgments.

SEC. 527. All final judgments in the supreme and circuit courts, and courts of common pleas, for the recovery of money or costs shall be a lien upon real estate, and chattels real, liable to execution in the county where the judgment is rendered for the space of ten years after the rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by any appeal, or injunction, or by the death of the defendant, or by agreement of the parties entered of record.*

*The judgments of the U. S. circuit court are liens upon the real estate of judgment-defendants throughout the State.—*Simpson* vs. *Niles*, 1 Carter's Ind. Rep. 196.

A judgment is no lien on land held by the judgment-defendant under a title-bond.—*Doe d. Cooper* vs. *Cutshall*, 1 Carter's Ind. Rep. 246.

See *Bryer et al.* vs. *Chase*, 8 Blackf. 508. See title "Foreclosure of Mortgage," R. S. vol. 2.

A. sold and conveyed a tract of land to B. Afterwards A. purchased back the land from B., paid him for the same, and took possession, B. at the same time delivering up to A. to be cancelled, the deed which had been executed to him by A., and which had not been recorded. No conveyance was executed by B. to A. Held, that the legal title to the land remained in B. Held, also, that a judgment rendered against A. after said deed was delivered up to him to be cancelled, was not a lien on the land.—*Orth* vs. *Jennings et al.*, 8 Blackf. 420.

Lands purchased by the debtor after the judgment, and aliened before execution to a *bona fide* purchaser, are bound by the judgment.—*Ridge* vs. *Prather*, 1 Blackf. 401.

A purchaser at sheriff's sale obtains all the interest that the execution-debtor had in the property.—*Way et al.* vs. *Lyon*, 3 Blackf. 76.

A judgment is no lien on land which the debtor holds by a bond conditioned for the execution of a title on payment of the purchase money, though he had taken possession and paid the money before the rendition of the judgment; and a sheriff's sale on execution against the obligee of land so held, conveys no estate to the purchaser.—*Modisett, &c.* vs. *Johnson, &c.*, 2 Blackf. 431.

Ejectment. The lessor of the plaintiff claimed the premises in dispute, as a purchaser under an execution on a judgment in his favor against one S. The defendant claimed the premises as a prior purchaser under an execution, issued before the lessor's, on a judgment rendered against S. at the same term with the other, but a few days later. The lessor's execution was issued and delivered to the sheriff a short time before the defendant's purchase, of which the latter had notice. Held, that the plaintiff was entitled to recover.—*Whitney* vs. *Right ain d. Southwick et al.*, 6 Blackf. 322.

I. H. obtained a judgment against J. L. for a certain sum of money, which judgment the former assigned to T. H. The judgment was rendered on a note, which I. H. had placed in the hands of one R. as a security for a debt due by the former to the latter. J. L. afterwards, without notice of R.'s lien, paid the judgment to T. H., to whom notice of the lien had been given. Held, that J. L., who had paid the judgment in good faith, was discharged from its operation.—*Lewis* vs. *Hicklin*, 5 Blackf. 196.

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Certified copy of judgment filed in another county—lien—reversal—restitution.

Certified copy may be filed in another county.

SEC. 528. It shall be the duty of the clerk of the court rendering any judgment, to make out a certified copy thereof, under the seal of the court, at the request of any person interested, which copy if taken from the circuit or supreme court, may be filed in the office of the clerk of any circuit court, and if taken from the court of common pleas, in the office of the clerk of any court of common pleas of this State, and when so filed, shall be recorded and entered in the judgment docket in the same manner as judgments rendered in such court.

Lien in such case.

SEC. 529. Such judgment, from the time of filing the copy aforesaid, shall be a lien upon all the real estate of the judgment-debtor situated in the county where filed, as fully as if such judgment had been rendered therein.

Certificate of purchase.

SEC. 530. Every certificate of purchase at a land office of the United States, shall be evidence of legal title to the land therein described.

Recognizance.

SEC. 531. Every recognizance shall bind the real estate of the principal from the time it is taken; but shall only bind the real estate of the surety from the time judgment of forfeiture is rendered.

Execution.

SEC. 532. An execution against property issued to another county, shall bind the real estate of the defendant from the time of the levy.

Reversal of judgment.

SEC. 533. The reversal of any judgment by virtue of which any real estate has been sold or transferred, or the title thereto affirmed, shall not avoid the sale, transfer or title, if the person to be affected thereby shall be, or shall claim under, a purchaser in good faith, and not a party to the record, or attorney of any party.

When the defendant cannot have restitution

SEC. 534. In every case of a sale, transfer or confirmation of real estate upon execution, or by judgment, where the defendant cannot have restitution of his estate, he shall be entitled to recover of the judgment-plaintiff the full value of the estate, with intesest, when the judgment-plaintiff has purchased the estate, or had the same transferred or confirmed to him; and when the land has been sold by the sheriff to any other person, he may recover the proceeds of the sale, with interest, deducting the amount applied to the costs of the judgment-defendant.

Other cases of reversal.

SEC. 535. In every other case of a reversal of any judgment, by virtue of which any real estate has been sold or transferred, or the title confirmed, the judgment-defendant shall have restitution thereof as follows:

Notice.

SEC. 536. He may notify the purchaser or his tenant, or other person in possession, that at the next term he will move the court which rendered the judgment, to restore to him the possession of the premises.

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Judgment.

SEC. 537. Upon proof that the notice has been served ten days, the court may proceed to hear and determine the issues made by the parties, and render judgment accordingly; or the judgment-defendant may recover his real estate by the ordinary action.

Sale not to be avoided for certain defects.

SEC. 538. No sale of any real estate, made by an executor, administrator or guardian, shall be avoided, on account of any irregularity or defect in the proceedings, if it shall appear,

First. That the sale was authorized by a court of competent jurisdiction.

Second. That the executor, administrator or guardian gave bond, as required by law.

Third. That notice of the time and place of sale was given in the manner prescribed by law; and

Fourth. That the premises were sold accordingly, and are held by or under one who purchased them in good faith.*

ARTICLE XXV.

Docketing Justices' judgments, and proceedings thereon.

Transcript of proceedings on a justice's docket.

SEC. 539. It shall be the duty of every justice of the peace in this State, when requested by the plaintiff or his agent, to make out and certify a true and complete transcript of the proceedings and judgment in any cause, upon any docket, legally in his possession. The plaintiff may file such transcript

* See ante, title "Sheriff of circuit court," p. 11; also, "Executions" and "Judgments," Civil Code, and notes.

The sale of real estate on a void execution, is a nullity, and vests no title in the purchaser.—*Elliott* vs. *Armstrong*, 2 Blackf. 199.

The title of a *bona fide* purchaser of real estate at sheriff's sale, cannot be impeached for any error in the judgment; nor on account of the execution having issued out of season; nor for any fault of the sheriff in not pursuing the direction of the statute, as respects the inquest, advertisement of sale, &c. To support his title, however, the purchaser must show the sale to have been authorized by the judgment of a court of competent jurisdiction, and by the kind of execution which the statute prescribes.—*Armstrong* vs. *Jackson, d. Elliott*, 1 Blackf. 210.

But a sale by the sheriff of land to the execution-plaintiff for less than one-half of the appraised value, as required by the statute of 1820, is void, and his deed conveys no title to the purchaser.—*Harrison et al.* vs. *Doe, &c.*, 2 Blackf. 1.

If the purchaser of real estate at sheriff's sale be the execution-plaintiff, he is considered a purchaser with full notice, and accountable for all irregularities.—*Ib.*

The conduct of the sheriff, in selling the whole instead of a part of the lot, may avoid the sale.—*Doe ex dem. Maguire* vs. *Smith*, 4 Blackf. 228.

So to impeach the title acquired at sheriff's sale, evidence may be received, showing that when the sheriff sold the land, it was known to the purchaser that the rents and profits had not been offered for sale.—*Ibid.*

A purchaser of land at sheriff's sale is not bound to show that the debtor had not personal property to satisfy the judgment. It is only necessary for him to show the judgment of a competent court, and the kind of execution which authorizes the sheriff to sell. He has a right to presume that all the intermediate proceedings are correct.—*Frakes* vs. *Brown*, 2 Blackf. 295.

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in the office of the clerk of any court of common pleas in this State.

To be a lien on real property.

SEC. 540. It shall be the duty of the clerk forthwith to record the transcript in the order book, and docket the judgment in the execution docket. The judgment set forth in the transcript shall be a lien upon the real property of the defendant, within the county, to the same extent as judgments of the court of common pleas, from the time of filing the transcript.

Execution upon such judgment.

SEC. 541. Whenever the plaintiff shall also procure from the justice a certificate that an execution has been issued upon the judgment to the proper constable, and by him returned, indorsed that no goods or chattels could be found, sufficient to satisfy the judgment, or a part thereof, and file the certificate with the clerk, he shall record it in the order book with the transcript; and, upon the plaintiff or his agent also filing with the clerk his affidavit that the judgment is unpaid, in whole or in part, stating the amount due, he shall issue an execution upon the judgment, and indorse the amount to be levied of principal, interest and costs; which execution shall be issued, served and returned in the same manner as executions issued upon judgments of the court of common pleas.

ARTICLE XXVI.

Commissioner to convey Real Estate.

When conveyed by commissioner.

SEC. 542. Real property may be conveyed by a commissioner appointed by the court:

First. Where, by the judgment in an action, a party is ordered to convey real property to another, or any interest therein.

Second. Or where real property, or any interest therein, has been sold, and the purchase money paid.

Deed.

SEC. 543. The deed of the commissioner shall so refer to the judgment authorizing the conveyance, that the same may be readily found; but need not recite the record in the case generally.

Title.

SEC. 544. A conveyance made in pursuance of a judgment, shall pass to the grantee the title of the parties ordered to convey the land.

Same.

SEC. 545. A conveyance made in pursuance of a sale ordered by the court, shall pass to the grantee the title of all the parties to the action or proceeding.

Approval.

SEC. 546. A conveyance by a commissioner shall not pass any right, until it has been examined and approved by the court, which approval shall be indorsed on the conveyance, and recorded with it.

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Names of parties need not be signed.

SEC. 547. It shall be sufficient for the conveyance to be signed by the commissioner only, without affixing the names of the parties whose title is conveyed; but the names of the parties shall be recited in the body of the conveyance.

To be recorded.

SEC. 548. The conveyance shall be recorded in the office in which, by law, it should have been recorded, had it been made by the parties whose title is conveyed by it.

Attachment, or sequestration.

SEC. 549. In case of a judgment to compel a party to execute a conveyance of real estate, the court may enforce the judgment by attachment or sequestration, or appoint a commissioner to make the conveyance.*

ARTICLE XXVII,

Appeal in Civil Actions.

Appeal to supreme court.

SEC. 550. Writs of error are hereby abolished. Appeals may be taken from the courts of common pleas and the circuit courts, to the supreme court, by either party, from all final judgments, except in actions originating before a justice of the peace, or mayor of a city, where the amount in controversy, exclusive of interest and costs, does not exceed ten dollars. The party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon.

Part of co-parties may appeal.

SEC. 551. A part of several co-parties may appeal, but in such case they must serve notice of the appeal upon all the other co-parties, and file the proof thereof with the clerk of the supreme court. Unless they appear, and decline to join, they shall be regarded as having joined, and shall be liable for their due proportion of the costs. If they decline to join, their names may be struck out, on motion, and they shall not take an appeal afterwards, nor shall they derive any benefit from the appeal, unless from the necessity of the case, except persons under legal disabilities.

Appeal may be taken after death of party.

SEC. 552. In case of the death of any or all the parties to a judgment before an appeal is taken, an appeal may be taken by, and notice of an appeal served upon, the persons in whose favor, and against whom, the action might have been revived, if death had occurred before judgment.

Death not to abate proceedings.

SEC. 553. The death of any or all the parties shall not cause the proceedings to abate; but the names of the proper persons being substituted, upon consent or upon notice, the cause may proceed.

When a female party shall marry.

SEC. 554. If a female, who is a party to a judgment, marry, and an appeal be pending, or afterwards taken, the husband must be notified and joined as appellant or appellee.

*See appendix, R. S. Vol. 2, title "Sequestration," for an explanation thereof.

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Appeals—bond—after term-time—publication of notice—transcript.

Bond.

SEC. 555. When an appeal is taken during the term at which the judgment is rendered, it shall operate as a stay of all further proceedings on the judgment, upon an appeal bond being filed by the appellant, payable to the appellee, with condition that he will duly prosecute his appeal, and abide by and pay the judgment and costs which may be rendered, or affirmed against him, with such penalty and surety as the court shall approve; to be filed within such time as the court shall direct, and the transcript shall be filed in the office of the clerk of the supreme court within sixty days after filing the bond.

Appeals after term-time.

SEC. 556. After the close of the term at which the judgment is rendered, an appeal may be taken by the service of a notice in writing on the adverse party or his attorney, and also on the clerk of the court in which the proceedings were had, stating the appeal from the judgment, or some specific part thereof; or such appeals may be taken by procuring from the clerk of the court a transcript of the record, and proceeding in the suit, or so much thereof as is embraced in the appeal, and filing the same in the office of the clerk of the supreme court, who shall indorse thereon the time of filing, and issue a notice of the appeal to the appellee.

Publication of notice, when necessary.

SEC. 557. Whenever it shall appear to the supreme court, by satisfactory proof, that the appellee, in a cause appealed after the close of the term, is not a resident of this State, and that a notice of the appeal cannot be served upon the attorney of record in the court below, the court may order that notice of the pendency of the appeal be given in some newspaper printed and published in this State, for three weeks successively; after which the court shall proceed in all respects as if the defendant had been served with process.

Clerk to make out transcript.

SEC. 558. Upon the request of the appellant, or upon being served with notice as aforesaid, and in either case upon the payment of the proper fee, the clerk shall forthwith make out and deliver to the party, at his request, or transmit to the clerk of the supreme court a transcript of the record in the cause, or so much thereof as the appellant, in writing directs, certified and sealed, to which shall be appended the written directions of the appellant above contemplated, if any.

What deemed parts of the record, and what clerk to certify to.

SEC. 559. All proper entries made by the clerk, and all papers pertaining to a cause, and filed therein, (except a summons for the defendant, where all the persons named in it have appeared to the action, and summons for witnesses, depositions, and other papers which are used as mere evidence) are to be deemed parts of the record; but a transcript of motions, affidavits, and other papers, when they relate to collateral matters, and depositions, and papers filed as mere

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evidence, shall not be certified, unless made a part of the record by exception, or order of court, and directed to be certified by the appellant. Neither shall the clerk certify any pleading first filed, when there is an amended pleading of the same matter subsequently filed, embracing all the pleading first filed, and the amendments thereto; but shall certify such amended pleading only. Every paper and pleading above excepted, may be made part of the record by exceptions, or order of the court, on motion. If the clerk should certify matter not material to the determination of the appeal, the supreme court may direct the person blameable therefor to pay the costs thereof.

When to stand for trial.

SEC. 560. Every appeal shall stand for trial at the first term of the supreme court after filing the transcript, when taken during the term of the court below. And in all other cases when notice has been served ten days, or publication made thirty days before the first day of the term.

Appeals to be taken within three years.

SEC. 561. Appeals, in all cases hereafter tried, must be taken within three years from the time the judgment is rendered; in all cases heretofore tried, must be taken within three years from the time this act takes effect; but the time allowed the appellant by the pre-existing law, shall not be enlarged. Where the appellant is under legal disabilities at the time the judgment is rendered, he may have his appeal at any time within three years after the disability is removed.

When part of the appellants only, are barred by limitation.

SEC. 562. The supreme court, upon being satisfied that the statute of limitations has barred a part only of the appellants, may strike their names from the record, and proceed to affirm, or reverse, or modify the judgments, as to those appellants only who are before the court.

Appeal after term not to stay proceedings, except, &c.

SEC. 563. An appeal taken after the close of the term, shall not stay execution, or other proceedings in the court below, unless an order to that effect be granted by the supreme court in term, or by any judge thereof in term or vacation, which shall be indorsed on the transcript. The court or judge shall, at the time of making the order, direct that the appellant give bond to the appellee, with condition that he will duly prosecute his appeal, and abide by and pay the judgment and all costs which may be rendered or affirmed against him.

Who to approve bond.

SEC. 564. The appeal bond and surety may be approved by the clerk of the supreme court, or by the clerk of the court below. And upon the filing of the bond, execution and all other proceedings on the judgment in the court below, shall be stayed; and if execution has issued, the clerk shall notify the sheriff of the appeal and order to stay proceedings, and the execution shall be forthwith returned, and any levy made shall be relinquished.

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Appeals to supreme court—practice in—judgment—reversal—costs.

Certified copy of order to stay to be issued.

SEC. 565. Whenever an order to stay execution of a judgment is granted, the clerk of the supreme court shall issue a certified copy thereof to the clerk of the court below.

How long order to continue in force.

SEC. 566. Such order shall operate until the determination of the appeal, provided the appeal is determined in three years, but shall not continue in force more than three years from the granting thereof, nor shall there be a second order to stay the proceedings; but the proper party in the court below may have execution upon the judgment without further delay, unless the appeal has been determined, and other order made in the supreme court.

Exrs., admrs. and guardians not to give bond

SEC. 567. Executors, administrators and guardians may have an appeal and stay of proceedings in the court below, without giving an appeal bond.

Assignment of errors and answer.

SEC. 568. No pleadings shall be required in the supreme court upon an appeal but a specific assignment of all errors relied upon, to be entered on the transcript in matters of law only, which shall be assigned on or before the first day of the term at which the cause stands for trial; and the appellee shall file his answer thereto.

Judgment of supreme court.

SEC. 569. The supreme court may reverse or affirm the judgment below, in whole or in part, and remand the cause to the court below; but the court shall not reverse the proceedings any further than to include the first error. If the court affirm the judgment after an order of stay of execution has been granted, damages may be assessed in favor of the appellee, not exceeding ten per cent. upon the judgment, and the court shall remand such cause for execution.

In case of reversal.

SEC. 570. When the judgment is reversed, in whole or in part, the supreme court shall remand the cause to the court below, with instructions for a new trial, when the justice of the case requires it; but if no new trial is required, with particular instructions relative to the judgment to be rendered, and all modifications thereof.

Re-hearing.

SEC. 571. When any cause is determined in the supreme court, the clerk shall forthwith notify the clerk of the court below, that it is determined, and whether reversed or affirmed, in whole or in part, or dismissed; at any time within sixty days after such determination, either party may file a petition for a re-hearing; if not so filed, the decision and instructions of the supreme court shall be certified to the court below, unless otherwise ordered by the court.

Death or marriage of parties.

SEC. 572. If the death of any or all of the parties occur, or any female being a party marries, after the submission of a cause, judgment shall be rendered as at the term at which the submission was made, without any change of parties.

Costs.

SEC. 573. When the judgment is affirmed in whole, the appellee shall recover costs; and when the judgment is

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reversed in whole, the appellant shall recover costs in the supreme court and the court below, to the time of the first error for which the judgment is reversed, which shall be pointed out in the opinion of the supreme court. In all other cases costs shall be awarded as the court may deem right, following, as nearly as possible, the general regulation for awarding costs.

What included in costs.

SEC. 574. The fee paid for procuring the transcript, the costs of serving notice of the appeal, and the printer's fee for publication, are a part of the costs of the supreme court.

When the judges are equally divided.

SEC. 575. Whenever, on hearing an appeal, the judges of the supreme court are equally divided in opinion, the cause shall be continued to the next term, and if then the judges be still equally divided, the judgment shall be affirmed without costs; in such case each judge shall give his written opinion of each point in the case arising upon the record, which shall be reported among the cases decided by the supreme court.

Appeals from an interlocutory order.

SEC. 576. Appeals to the supreme court may be taken from an interlocutory order of any court of common pleas, or circuit court, or judge thereof, in the following cases:

First. For the payment of money; to compel the execution of any instrument of writing, or the delivery or assignment of any securities, evidences of debt, documents, or things in action.

Second. For the delivery of possession of real property, or the sale thereof.

Third. Granting or dissolving, or overruling motions to dissolve, an injunction in term, and granting an injunction in vacation.

Fourth. Orders and judgments upon writs of *habeas corpus*, made in term or vacation.

When taken.

SEC. 577. Such appeal may be taken at the term of the court at which the order is made; or when made in vacation, the appeal may be taken at the time, or during the next term; the appeal shall not be granted until the appellant has filed an appeal bond, as in other cases of appeal.

Length of stay in such case.

SEC. 578. Such appeal shall not stay proceedings upon the order more than thirty days, unless the supreme court in term, or some judge thereof in term or vacation, shall otherwise order.

Executions.

SEC. 579. Executions issued from the supreme court, shall be the same as those of other courts of record; and shall be returnable at such common return day as the court shall direct.

Judgment not to be stayed or reversed for defects in form, &c.

SEC. 580. No judgment shall be stayed or reversed, in whole or in part, by the supreme court for any defect in form, variance or imperfections, contained in the record, pleadings, process, entries, returns, or other proceedings therein, which by law might be amended by the court below; but such defects

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Appeals to supreme court—certain defects disregarded.

shall be deemed to be amended in the supreme court; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below.*

* A judgment of the circuit court on the merits of a cause submitted to it, will be reversed, if, as shown by the record, it be not sustained by the evidence.—*The State Bank* vs. *Seaman et al*, 8 Blackf. 181.

A judgment in a cause will not be reversed on account of the admission of illegal evidence, if the judgment is right independently of that evidence.—*Parker et al.* vs. *The State*, 8 Blackf. 292.

See *Galbreath* vs. *Doe d. Zook et al.*, 8 Blackf. 366; *Peterson et al.* vs. *Dickey*, 8 Blackf. 427.

If a judgment of the circuit court be right, though placed on wrong ground, it will be affirmed.—*The State* vs. *Michaels et al.*, 8 Blackf. 436. See *Cain* vs. *Foote*, 8 Blackf. 454.

A defendant cannot object to a judgment against him on the ground that his own pleadings are defective.—*Henderson* vs. *Barbee*, 6 Blackf. 26.

The overruling of an objection to a leading question, put by the plaintiff to one of his witnesses, cannot be assigned for error, unless the record show that the defendant was injured by the answer of the witness.—*Culbertson* vs. *Stanley*, 6 Blackf. 67.

The judgment of the circuit court will not be reversed on the weight of evidence, if the evidence be contradictory.—*Kendall* vs. *Hall*, 6 Blackf. 507.

See *Bisel et al.* vs. *Hobbs*, 6 Blackf. 479; *Barton* vs. *Osborn*, 6 Blackf. 145.

A party who voluntarily suffers a non-suit as to one count, cannot complain of any error in the proceedings under that count.—*Kelsey* vs. *Ross et al.*, 6 Blackf. 536.

If a plaintiff suffer a non-suit in consequence of an erroneous exclusion of his evidence, he is not entitled to a writ of error.—*Vestal* vs. *Burditt et al.*, 6 Blackf. 555.

If a special plea in bar in denial, be set aside on the plaintiff's motion, and the cause be afterwards fully and fairly tried on the merits, in the same manner as if a plea had been filed requiring the plaintiff to prove every fact necessary to support the action, the setting aside the plea cannot be assigned for error by the defendant.—*Darter et al.* vs. *The State*, 5 Blackf. 61.

If a new trial, applied for on an affidavit of newly discovered evidence, be improperly refused, the refusal may be assigned for error.—*Hodges* vs. *Springer*, 5 Blackf. 103.

A judgment of the circuit court without a jury will not be reversed on the ground that it is not warranted by the evidence, unless it be obviously wrong.—*Rogers* vs. *Bishop et ux.*, 5 Blackf. 108.

A party cannot assign for error the suppression of his depositions, unless the record show that notice of taking them had been given to his adversary.—*Wright* vs. *Stewart*, 5 Blackf. 120.

If the statements of a third person, whether oral or written, be given in evidence without objection, the admission cannot afterwards be assigned for error.—*Judah* vs. *Mieure*, 5 Blackf. 171.

See *Redpath et al.* vs. *Nottingham*, 5 Blackf. 267.

The overruling of an objection to illegal testimony offered cannot be assigned for error, if no such testimony was, in fact, introduced.—*Findley* vs. *The State*, 5 Blackf. 576.

The admission of illegal evidence, if it could have no bearing on the merits of the cause, does not render the proceedings erroneous.—*Smith* vs. *Mosier*, 5 Blackf. 51.

A party cannot complain of the rejection of testimony, unless the record show that he was injured by the rejection.—*Lett* vs. *Horner*, 5 Blackf. 296.

The court has no authority to non-suit a plaintiff against his consent.—*Bone* vs. *Davis et al.*, 5 Blackf. 115.

The plaintiff having introduced his testimony, was called, on the defendant's motion, and non-suited. It appeared that when the plaintiff was called, he was in court and did not answer. Held, that the non-suit was with the

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Appeals to supreme court—proceedings to be signed by chief judge.

Defects in transcript and appeal bond may be corrected.

SEC. 581. No appeal shall be dismissed for any informality or defect in the transcript or appeal bond, if the appellant shall correct the informality or defect within a reasonable time. When an appeal has been dismissed for want of prosecution, the court may reinstate it at the same or the next term, good cause being shown. When any appeal has been dismissed, another appeal may be taken.

Questions of fact.

SEC. 582. All questions of fact to be determined in the supreme court, shall be tried according to rules to be adopted by the court.

Proceedings to be drawn up, and signed by chief judge.

SEC. 583. The proceedings of the court for every day of the term shall be drawn up at full length by the clerk, against

implied consent of the plaintiff, and that he was not entitled to a writ of error.—*Moore* vs. *Herndon*, 5 Blackf. 168.

A writ of error lies to a judgment of non-suit where the plaintiff suffers the judgment in consequence of an express instruction to the jury against his right to recover.—*English et al.* vs. *Devarro*, 5 Blackf. 588.

The quashing of the writ puts an end to the suit, and is a final judgment which may be reversed on appeal.—*Cole et al.* vs. *Penivell et al.*, 5 Blackf. 175.

If a suit be brought to the supreme court a second time on appeal or writ of error, the proceedings since the cause was remanded can only be examined.—*Hobson* vs. *Doe d. Harper et al.*, 4 Blackf. 487.

See *Raymond et al.* vs. *Simonson*, 4 Blackf. 77.

If evidence be admitted in the circuit court without objection, its admission cannot be afterwards assigned as error.—*Perkins* vs. *Smith*, 4 Blackf. 299.

If any of the defendants in an action of tort are acquitted, and they neglect to ask for a judgment for costs, the want of such a judgment does not render the proceedings erroneous.—*Tyrell et al.* vs. *Lockhart*, 3 Blackf. 136.

See *The State* vs. *Beem et al.*, 3 Blackf. 222.

If a new trial, moved for on account of the insufficiency of the evidence, be refused, and the refusal assigned for error, the impropriety of the verdict must appear beyond all doubt, or this court will not interfere.—*Mann et al.* vs. *Clifton*, 3 Blackf. 304.

If, in the circuit court, on an appeal from the judgment of the justice, the defendant file additional pleas without objection, the plaintiff cannot assign the filing of those pleas for error.—*Tyler et al.* vs. *Denson*, 3 Blackf. 347.

If the evidence relative to the merits of the action be contradictory, and the jury have any grounds for their verdict in favor of the plaintiff, a court of errors will not reverse a judgment on the verdict, because a new trial had been refused. *Aliter*, if there was no evidence of a fact essential to the support of the action.—*Rapp* vs. *Grayson*, 2 Blackf. 130.

See *Lambert* vs. *Sandford*, 2 Blackf. 137.

If any error of the evidence, which is contradictory, conduce to prove the plaintiff's case, and he obtain a verdict, the refusal to grant to the defendant a new trial, on account of the insufficiency of the evidence, will not, except in extreme cases, be available in error. And when a new trial is applied for on account of excessive damages, and refused, the damages must be outrageously excessive, or a court of error will not interfere.—*Hoagland et al.* vs. *Moore*, 2 Blackf. 167.

It always is presumed by the supreme court, that all the evidence necessary to sustain the verdict was given to the jury, unless the contrary be shown by the record.—*Cooper* vs. *Adams et al.*, 2 Blackf. 294.

See *Blaney* vs. *Finley et al.*, 2 Blackf. 338.

After a cause had been continued, the parties appeared during the same term and proceeded to trial. This was held not to be erroneous. The proceeding to trial, which must be presumed to have been by consent, cancelled the order of continuance.—*Wilson* vs. *Coles*, 2 Blackf 402.

If the continuance of a cause be refused, when the party is legally entitled to it, the judgment will be reversed.—*Vanblaricum* vs. *Ward*, 1 Blackf. 50.

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the next sitting of the court, and such corrections being made therein as shall be necessary and right, and shall be signed by the chief judge of the court.

Order of hearing.

SEC. 584. The clerk shall docket all appeals in the order in which the transcripts are filed, and they shall be heard in the same order, unless the court, for good cause shown, direct a different mode of hearing.

Appellate court may compel inferior courts to send up papers.

SEC. 585. Any appellate court shall have full power to compel any inferior court, board, or officer exercising judicial functions, or other person, to certify to such court a full and complete transcript of the records and proceedings of any such tribunal, board, officer or person, and the production of any paper, whenever it shall be necessary for the proper determination of any cause or proceeding pending before the appellate court. The breach of any order may be punished as a contempt.

ARTICLE XXVIII.

Proceedings to review Judgments.

Who may have, and when may be had, a review

SEC. 586. Any person who is a party to any judgment, or the heirs, devisees or personal representatives of a deceased party, may file in the court where such judgment is rendered, a complaint for a review of the proceedings and judgment at any time within three years next after the rendition thereof. Any person under legal disabilities, may file such complaint at any time within three years after the disability is removed. But no complaint shall be filed for a review of a judgment of divorce. *

For what.

SEC. 587. The complaint may be filed for any error of law appearing in the proceedings and judgment, or for material new matter, discovered since the rendition thereof, or for both causes, without leave of court.

New matter.

SEC. 588. When the complaint for a review is filed for new matter discovered since the rendition of the judgment, it shall be verified by the complainant, and show that the new

* A defendant to a bill in equity, having negligently suffered a decree against him, cannot allege his own negligence in support of a bill of review.—*Gullet et al.* vs. *Housh*, 7 Blackf. 52.

If a defendant in equity knew of certain facts necessary to his defense, before the rendition of a decree against him, he cannot support a bill of review by alleging that he has, since the decree, discovered certain evidence of these facts, without showing that he could not prove them by other testimony.—*Ibid.*

The statute of limitations may be relied on in bar of a bill of review.—*Ibid.*

A bill of review, on account of newly discovered evidence, cannot be sustained, if, by the use of reasonably active diligence, the evidence might have been known to the complainant before the trial of the first cause.—*Jenkins* vs. *Prewitt*, 7 Blackf. 329.

See *Jenkins* vs. *Prewitt et al.*, 5 Blackf. 7.

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matter could not have been discovered before judgment by reasonable diligence; and that the complaint is filed without delay after the discovery.

Stay of proceedings.

SEC. 589. At any time after filing the complaint, and before the final hearing, the court may, upon application of the plaintiff, stay all further proceedings on the judgment. When proceedings are stayed, the court shall direct bond and surety to be given as in cases of appeal.

Notice.

SEC. 590. The defendant shall be notified of the filing of such complaint, and the parties shall proceed to form issues of law and fact as in other cases.

Judgment.

SEC. 591. Upon the hearing, the court may reverse or affirm the judgment, in whole or in part, or modify the same, as the justice of the case may require, and award costs according to the rule prescribed for the awarding of costs in the supreme court, on appeal.

ACTIONS IN PARTICULAR CASES.

ARTICLE XXIX.

To recover the possession of real property, and to determine conflicting claims thereto.

Action against tenant in possession.

SEC. 592. Any person having a valid subsisting interest in real property, and a right to the possession thereof, may recover the same by action to be brought against the tenant in possession; if there is no such tenant, then against the person claiming the title, or some interest therein.

SEC. 593. Whenever it appears that the defendant is only a tenant, the landlord may be substituted, reasonable notice thereof being given.

Service upon an agent, when.

SEC. 594. When the defendant is a non-resident, service may be had upon his agent for the property residing in the State, with the like effect as though made upon the principal, or service may be had by publication, as in other cases.

Complaint.

SEC. 595. The plaintiff in his complaint shall state that he is entitled to the possession of the premises, particularly describing them, the interest he claims therein, and that the defendant unlawfully keeps him out of possession.

Answer.

SEC. 596. The answer of the defendant must set forth under what claim of right (if any) he holds possession; and

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if as mere tenant, the name and residence of his landlord must be given; and if he does not defend for the whole premises, he shall specify for what particular part he does defend.

SEC. 597. Where the defendant makes defense, it shall not be necessary to prove him in possession of the premises.

Limitation. SEC. 598. The plaintiff cannot recover for the use and occupation of the premises for more than six years next before the commencement of the action.

Expiration of interest. SEC. 599. If the interest of the plaintiff expire before the time in which he could be put in possession, he shall obtain a judgment for damages only.

Two or more pltfs. or defts. SEC. 600. Where there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against one or more of the defendants, the premises or any part thereof, or any interest therein, or damages according to the right of the parties; but the recovery shall not be for a greater interest than that claimed.

Vacation of judgment and new trial. SEC. 601. The court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom judgment is rendered, his heirs or assigns or representatives, and upon the payment of all costs, and of the damages, if the court so direct, shall vacate the judgment and grant a new trial. The court shall grant but one trial, unless for good cause shown.

Notice. SEC. 602. If the application for a new trial is made after the close of the term at which the judgment is rendered, the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial.

Interest of third persons. SEC. 603. The result of the new trial, if application therefor is made after the close of the term at which the judgment is rendered, shall in no case affect the interest of third persons, acquired in good faith for a valuable consideration since the former trial.

But damages may be recovered. SEC. 604. But the party who, on such new trial, shows himself entitled to the lands which have thus passed to the hands of a purchaser, in good faith, may recover the proper amount of damages against the other party either in the same or in subsequent actions.

Judgment conclusive, when. SEC. 605. In an action against a tenant the judgment shall be conclusive evidence against the landlord who has received notice as hereinbefore provided.

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Recovery of possession of real property—quieting title—costs.

SEC. 606. The plaintiff must recover on the strength of his own title.*

Order of survey. SEC. 607. The court, on motion, and after notice to the opposite party, may for cause shown, grant an order allowing the party applying therefor to enter upon the property in controversy, and make survey and admeasurement thereof for the purposes of the action.

Service of order. SEC. 608. The order must describe the property, and a copy thereof must be served upon the owner or person having the occupancy and control of the land.

Permanent improvements. SEC. 609. When the plaintiff in an action of this nature is entitled to damages for withholding or using or injuring his property, the defendant may set off the value of any permanent improvements made thereon, to the extent of such damages, unless he prefers to avail himself of the law for the benefit of occupying claimants.†

Exemplary damages. SEC. 610. In case of wanton aggression on the part of a defendant, the jury may award exemplary damages.

Quieting title. SEC. 611. An action may be brought by any person either in or out of possession, or by one having an interest in remainder or reversion, against another who claims title to, or interest in, real property adverse to him, although the defendant may not be in possession thereof, for the purpose of determining and quieting the question of title.

SEC. 612. The rules above prescribed shall in such cases be observed as far as they are applicable.

Costs. SEC. 613. If in such cases the defendant disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the defendant shall recover costs.

Action by tenant in common, &c. SEC. 614. In an action by a tenant in common or joint tenant of real property, against his co-tenant, the plaintiff must show, in addition to his evidence of right, that the

* The plaintiff in ejectment must recover on the strength of his own title.—*Eldon* vs. *Doe d. Wynn et al.*, 6 Blackf. 341.

The plaintiff in ejectment need not go further back in deducting his title in the first instance, than the will of a person under whom he claims, who died seized of the land. The law presumes a fee simple in the devisor, unless the contrary is shown —4 Wash. C. C. Rep. 691.

In ejectment by one devisee against another devisee, evidence to dispute the original title of the testator under whom both claimed, is not admissible.—2 Rawle, 68.

In ejectment against a stranger, the defendant cannot object to the title of the plaintiff, founded on a conveyance of the legal estate by a trustee, on the ground of its having been an abuse of the trust.—1 Watts, 533.

† See Post, R. S. Vol. 2, p. 172.

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defendant either denied the plaintiff's right, or did some act amounting to such denial. *

* The following decisions of courts upon the old real actions, though not, in every instance, applicable to the remedy provided in the foregoing article, may prove useful in construing its provisions, and are therefore, here appended:

The defendant in ejectment may defeat the suit by proving the title to the premises to be in a third person.—*Connelly* vs. *Skelly*, 8 Blackf. 320; *Galbreath* vs. *Doe d. Zook et al.*, 8 Blackf. 366; *Sherry et al.* vs. *Denn d. State Bank*, 8 Blackf. 542.

In ejectment by a purchaser at a sheriff's sale, under the execution-debtor, or collusively, the defendant cannot set up an outstanding title in a third person. —*Ibid.*

See *Williamson* vs. *Doe d. Crawford*, 7 Blackf. 12.

In ejectment against a trespasser, notice to quit need not be proved.—*Mceker* vs. *Doe d. Place*, 7 Blackf. 169.

In ejectment for an entire tract of land, any undivided portion of it may be recovered.—*Doe d. Moore et ux.* vs. *Abernethy*, 7 Blackf. 442.

In trespass for *mesne* profits after judgment in ejectment, the defendant, to prevent a recovery of profits that accrued before service of the declaration in ejectment, may prove that he had not occupied the premises before such notice. *Vance* vs. *The Inhabitants, &c.* 7 Blackf. 241.

A joint demise by several heirs of real estate, is sufficient to support ejectment.—*Robinoe* vs. *Doe d. Colwell et al.*, 6 Blackf. 85.

Possession is *prima facie* evidence of title.—*Ibid.*

The possession of property by an executor raises a presumption that he was seized in fee, and is sufficient, *prima facie*, to support an ejectment upon the demise of the heirs.—*Ibid.*

As to notice to quit in the old action of disseizin, see *Allen* vs. *Smith*, 6 Blackf. 527.

A person in possession of real estate, under a contract of sale with A., the owner, is not liable to an action of ejectment by the lessee of a subsequent vendee of A., without a demand of possession.—*Stackhouse et al.* vs. *Doe d. Reynolds et al.*, 5 Blackf 570.

Ejectment. The defendant had purchased the premises for a valuable consideration of one of the lessors, who was a female and under age. The grantor afterwards married the other lessor. The defendant had been in possession of the premises, under his purchase, for several years after the marriage, and after the grantor's majority, with the acquiescence of herself and husband. Held, that if the lessors might, under the circumstances, avoid the conveyance, still, unless notice of their intention to do so had been given to the defendant, the suit could not be sustained.—*Clawson* vs. *Doe d. Moore et ux.*, 5 Blackf. 300.

A. died in possession of a tract of land, which he held by virtue of a title bond executed by C. The widow of A. remained in possession and married B., who also continued in possession. C., having the legal title, brought an action of disseizin for the premises against B., without having previously demanded the possession. Held, that C. could not sustain the action of disseizin against B., under the circumstances of the case, without having previously demanded possession.—*Taylor* vs. *McCrackin*, 2 Blackf. 260.

As to proof of the testator's death, in case of an executor, who claims under such testator, being admitted instead of the tenant in possession, see *Buntin* vs. *Doe*, 1 Blackf. 26.

A tenant at will can maintain an action of ejectment.—1 Blackf. 26.

One tenant in common may sue separately in ejectment for his individual share of the estate.—*Chesround* vs. *Cunningham*, 3 Blackf. 82.

An executor may maintain ejectment for lands held by the testator for a term of years.—*Duchane* vs. *Goodtitle*, 1 Blackf. 117.

It is not prerequisite to a recovery in ejectment that the plaintiff should trace his lessor's title back to the government: the legal right of possession is the subject of controversy in this action, not the ultimate title to the land.—*Doe* vs. *West*, 1 Blackf. 133.

In ejectment not barred by the statute of limitations, a prior peaceable possession under a claim of right, will prevail against a mere intruder.—*Ibid.*

If the purchaser of real estate at sheriff's sale, bring an action of ejectment

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Recovery of possession of real property—decisions of courts.

to recover possession, and the defendant be any other person than the judgment-debtor, the plaintiff must prove the title of the debtor to the premises.—*Calloway* vs. *Doe*, 1 Blackf. 372.

It is generally necessary, in ejectment, for the plaintiff to show a right of possession in his lessor at the date of the demise, and at the time the action was commenced.—*Jackson* vs. *Hughes*, 1 Blackf. 421.

In ejectment on several demises of several tracts of land, laid in different counts, if there be proof of one count only, the verdict should be in favor of the plaintiff on that count, and of the defendant on the others. But if, in such case, there be a general verdict of guilty, judgment may be taken on the count proved, and a *nolle prosequi* entered as to the others.—*Fite* vs. *Doe*, 1 Blackf. 127.

In an action of ejectment, the previous recovery of the defendant against the plaintiff's lessor in a forcible detainer, is no bar to the suit.—*Buntin* vs. *Doe*, 1 Blackf. 26.

The defendant may show that the title of the plaintiff's lessor has expired. *Doe* vs. *West*, 1 Blackf. 133.

The question whether a deed be fraudulent and void as to creditors, may be examined and decided in an action of ejectment.—*Brown* vs. *Wyncoop*, 2 Blackf. 230.

An infant having a title to land for which an action of ejectment is brought, has a right to be admitted a defendant on the usual terms; and the court should appoint a guardian for him, in order that he may be enabled to defend the suit.—*Glass* vs. *Doe*, 2 Blackf. 293.

In ejectment, *A.* and *B.* were admitted defendants, the former as tenant, the latter as landlord. Held, that *A.* was precluded, by his appearance as *B.*'s tenant, from afterwards showing that he was the tenant of the plaintiff's lessor, and entitled to notice to quit.—*Jones* vs. *Doe*, 1 Blackf. 351.

At common law, co-partners and joint tenants are obliged to lay a joint demise, while tenants in common are forbidden to lay any but separate demises. "The same advantage shall be had from a joint as from separate demises," means, that, as tenancy in common was the only species of joint interest in which separate demises must be laid hereafter, a joint demise should be equally proper. See lessee of *Adams* vs. *Turner*, 7 Ohio R. (part 2,) 136. But a person having exclusive title to lands, cannot unite with himself, in a joint demise, persons having no title.—*Ibid.*

Though a judgment in the action of disseizin settles the titles held by the parties at the time of its rendition, it does not prevent the losing party from enforcing a superior title subsequently acquired, nor preclude either of the parties from applying to a court of chancery to perfect his title or to enjoin a judgment obtained contrary to equity.—*Taylor* vs. *McCrackin*, 2 Blackf. 260.

The defendant in trespass for *mesne* profits, after a recovery against him in ejectment, cannot plead in bar of the action that the rents and profits, &c. do not exceed the value of his improvements, unless such value had been assessed under the direction of the court that rendered judgment in the action of ejectment.—*Chesround* vs. *Cunningham*, 3 Blackf. 82.

In trespass for *mesne* profits the recovery in ejectment is conclusive against the defendant, as to title, from the time of the demise.—*Buntin* vs. *Duchane*, 1 Blackf. 56.

In such action the defendant may show, in mitigation of damages, that his possession was under a judgment of a competent tribunal.—*Ibid.* See *Buntin* vs. *Duchane*, 1 Blackf. 255.

The plaintiff sought to recover land lying in Kentucky, claiming title under the heirs of James Reynolds, the original patentee of the tract; two of the heirs, daughters of said Reynolds, were *femes covert*, with whom their husbands had joined in the action. It was necessary to prove that the marriages of the *femes covert* took place before the action was brought.—4 Howard, 123.

The general rule is, that remedies, in respect to real property, are to be pursued according to the *lex loci rei sitæ*.—3 Wheat. 212; 3 Cond. Rep. 235.

If the plaintiff in his declaration claim the whole tract, a deed conveying an undivided interest is evidence.—9 Cranch, 151.

On a recovery in ejectment, the record of such recovery is not evidence in an action against third persons to establish the plaintiff's title; but it is admissible in connection with an executed writ of possession to show the fac possession —11 Wheat. 280; 6 Cond. Rep. 310.

In ejectment, possession accompanied with a claim of ownership in fee, is

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prima facie evidence of such estate. In such case, it is not the possession alone, but that it is accompanied with the claim of the fee, which gives this effect, by construction of law, to the acts of the parties.—1 Paine, 457.

But such effect is limited to the claims actually made; and a claim of a different kind cannot afterwards be set up for the purpose of aiding the first.——*Ibid.*

In an action of ejectment brought by a purchaser under a sheriff's deed, against the defendant in the execution, the defendant cannot question the title. The plaintiff need only show the judgment, execution and sheriff's deed.—3 Wash. C. C. R. 546.

Whether a conveyance is to be presumed from circumstances alleged to be sufficient to justify it, is a question of fact for the jury, under the advice of the court.—20 Ohio Rep. 231.

By the common law as well as under the statute, a tenant in common, in order to maintain ejectment against his co-tenant, must show an actual ouster, or some act amounting to a total denial of his right.—4 Comstock's N. Y. Rep. 61.

The denial must be such as to amount to a disseizin of the co-tenant, or establish an adverse possession on the part of the wrong doer.—*Ibid.*

The defendant, who was a tenant in common with the plaintiff of the title, "admitted himself to be in possession, claiming the premises in question as owner in fee thereof under a quit-claim deed" from a grantor who had owned an individual share, and which deed purported to remise, lease, and forever quit-claim unto the defendant, his heirs and assigns forever, the same premises, describing them by metes and bounds. Held, that the defendant was not guilty of any ouster or denial of his co-tenant's right, so as to subject him to an action of ejectment —*Ibid.*

By claiming title under such a deed merely, the defendant, it seems, only asserted his right to the share which his grantor held, and not to the whole premises.—*Ibid.*

Adverse possession is the enjoyment of land, or such estate as lies in a grant, under such circumstances as indicate that such enjoyment has been commenced and continued, under an assertion of a right on the part of the possessor.—1 Pick. Rep. 466.

Where the possession has been adverse for twenty years, of which the jury are to judge from the circumstances, the law raises a presumption of a grant. But this presumption arises only when the user or occupation would otherwise have been unlawful.—3 Greenl. R. 120.

Ejectment. The appellee offered the following evidence: 1. A deed made in 1834 by M., conveying all his interest, and as attorney in fact for K. and S., all their interest in the land to G. 2. A quit-claim deed from G. to the appellant, reciting that the land was conveyed to him in 1834 by M. 3. Depositions proving that the appellees were the heirs of K. and S., and that the latter persons died in 1834. The appellant offered no testimony. Judgment for the plaintiff below. Held, that the evidence was insufficient to sustain the judgment.—*Goodwin* vs. *Doe*, 1 Carter's Ind. Rep. 302.

In ejectment for a piece of land, a title-bond for a different price is inadmissible as evidence on the ground of irrelevancy; and parol evidence, to show that the land intended to be described in the bond is the same as that sued for, is inadmissible.—*Patterson* vs. *Doe d. Fisher*, 8 Blackf. 237.

Ejectment. The lessor claimed title to the premises as purchaser at sheriff's sale. The defendant offered to prove that previously to the judgment under which the lessor purchased, the judgment-debtor had conveyed the premises to one W., who, after said judgment, surrendered and cancelled the deed, and consented to the grantor's conveyance of the premises to another. The deed to W. was not recorded, but the lessor purchased with notice of it. Held, that the evidence was admissible to prove that the title to the premises was in W.—*Connelly* vs. *Doe d. Skelly*, 8 Blackf. 320.

An agreement in ejectment to be in possession of the premises, does not preclude the plaintiff from showing how the defendant got into possession.—2 Rawle, 232.

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ARTICLE XXX.

Occupying Claimants.

No writ of possession to issue, when.

SEC. 615. When an occupant of land has color of title thereto, and in good faith has made valuable improvements thereon and is afterwards in the proper action found not to be the rightful owner thereof, no execution shall issue to put the plaintiff in possession of the property after filing the complaint hereinafter mentioned, until the provisions of this chapter [article] are complied with.*

Complaint.

SEC. 616. The complaint must set forth the grounds on which the defendant seeks relief, stating, among other things, as accurately as practicable, the value of the improvements on the lands, as well as the value of the lands aside from the improvements.

Proceedings thereon.

SEC. 617. All issues joined thereon shall be tried as in other cases, and the court or jury trying the cause shall assess:

First. The value of all lasting improvements made aforesaid on the lands in question, previous to the commencement of the action for the recovery of the land.

Second. The damages, if any, which the premises may have sustained by waste or cultivation to the time of rendering judgment.

Third. The fair value of the rents and profits which may have accrued without the improvements, to the time of rendering judgment.

Fourth. The value of the estate which the successful claimant has in the premises, without the improvements.

Plff. may pay appraised value.

SEC. 618. The plaintiff in the main action may thereupon pay the appraised value of the improvements, deducting the value of the rents and profits, and the damages sustained, as assessed on the trial, and take the property.

Or, the deft. may do so.

SEC. 619. Should he fail to do this, after a reasonable time, to be fixed by the court, the defendant may take the property upon paying the appraised value of the land, aside from the improvements.

Or, parties to be tenants in common.

SEC. 620. If this be not done within a reasonable time, to be fixed by the court, the parties will be held to be tenants in common of all the lands, including the improvements, each

*This section is not unconstitutional.—*Armstrong* vs. *Jackson*, 1 Blackf. 374.

The legislature cannot deprive the parties of the constitutional right to have the value of the land, improvements, &c., assessed by a jury.—*Ibid.*

See *Chesround* vs. *Cunningham*, 3 Blackf. 82.

If the occupant evicted by a better title, under the occupying claimant law, be entitled to a compensation for his improvements, he is only liable for the rents and profits of the land without the improvements.—*Elliott* vs. *Armstrong*, 4 Blackf. 421.

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Occupying claimant—color of title—improvements—execution.

holding an interest proportionate to the value of his property as ascertained by the appraisement above contemplated.

Who has color of title.

SEC. 621. The purchaser in good faith at any judicial or tax sale, made by the proper person or officer, has color of title within the meaning of this chapter [article,] whether such person or officer had sufficient authority to sell or not, unless the want of authority was known to the purchaser at the time of the sale. And the rights of the purchaser shall pass to his assignees or representatives.*

Same.

SEC. 622. Any occupant of land who can show a connected title in law or equity, derived from the records of any public office, or who holds the same by purchase or descent from any person claiming title derived as aforesaid, or by deed duly recorded, has color of title within the meaning of this chapter [article.]

Improvements made by former occupants.

SEC. 623. The occupying claimant may recover the value of lasting improvements made by the party under whom he claims, as well as of those made by himself; and any person holding the premises as a purchaser, by an agreement in writing from the party having color of title, shall be entitled to this remedy.

Execution.

SEC. 624. The plaintiff shall be entitled to an execution for the possession of his property, in accordance with the provisions of this chapter [article,] but not otherwise.

Purchase-money, when to be refunded.

SEC. 625. Whenever any land sold by an executor, administrator, guardian, sheriff or commissioner of court, is afterwards recovered in the proper action by any person originally liable, or in whose hands the land would be liable to

* See R. S. Vol. I, page 136.

The claimant of real estate under a sale for taxes must show that the taxes under which the sale was made, were authorized by law.—*Doe d. Weed et al., vs. M. M'Quilken*, 8 Blackf. 335.

A sale of land for taxes is not valid unless the land was liable for all the taxes for which it was sold.—*McQuilkin* vs. *Doe d. Stoddard*, 8 Blackf. 581.

A judgment vesting in the State a title to land for the non-payment of taxes, rendered since the act of 1835 on the subject was repealed by that of 1839, is a nullity.—*Mount* vs. *The State*, 6 Blackf. 25.

To authorize a judgment vesting the title to land in the State, under the act of 1835, for the non-payment of taxes, there must be proof that all the requisites of the law have been complied with; and the evidence on the subject must appear on the record.—*Williams* vs. *The State*, 6 Blackf. 36.

Motion for judgment vesting in the State certain land for the non-payment of taxes. The land was described in the list as follows: "Richardson's heirs; 56 acres in the S. E. qr. of sec. 8, township 12, range 13." Held, that the description of the land was too imperfect to authorize the judgment.—*Richardson et al. vs. The State*, 5 Blackf. 51.

The record of a judgment vesting the title to land in the State for non-payment of taxes, should set out the evidence upon which the judgment was rendered.—*Smith* vs. *The State*, 5 Blackf. 65.

If the description of the land in a judgment in such case, differ materially from the description of it in the delinquent list filed, the variance is fatal.—*Ibid.*

The claimant of real estate under a sale for taxes, must show that the taxes had been legally assessed.—*Mason* vs. *Roe d. Woods*, 5 Blackf. 98.

As to lands sold at sheriff's sale, see ante, R. S. vol. 2, p. 141, and notes.

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pay the demand or judgment for which, or for whose benefit the land was sold, or any one claiming under such person, the plaintiff shall not be entitled to the possession of the land until he has refunded the purchase-money, with interest, deducting therefrom the value of the use, rents and profits, and injury done by waste and cultivation, to be assessed under the provisions of this act.

ARTICLE XXXI.

Partition of real estate.

Partition.

SEC. 626. Actions may be brought for the partition of lands, tenements and hereditaments, held or possessed by joint tenants, or tenants in common, in all cases; and the pleadings and practice in such actions shall conform to the provisions of this act.*

ARTICLE XXXII.

For Waste.

Waste, forfeiture and eviction

SEC. 627. Wrongs heretofore remediable by action of waste, shall be subjects of action as other wrongs in which there may be judgment for damages, forfeiture of the estate of the party offending, and eviction from the premises. Judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession when the injury to the estate in reversion shall be adjudged in the action to be equal to the value of the tenant's estate, or unexpired term, or to have been done in malice.†

*See R. S. vol. 2, title "partition," and notes.

Two tenants in common make partition of their lands and execute to each other releases in fee. One of them had only a life estate, but after the division the fee descends to him, and he subsequently sells and conveys in fee the part allotted to him in the partition. This it seems confirms the partition, so that he who held only the life estate cannot claim any interest in the part allotted to his co-tenant.—*Baker* vs. *Lorillard*, 4 Comstock's N. Y. Rep. 257.

†A mortgagee in possession, or his assignee, is accountable for the profits and for waste.—*McCormick* vs. *Digby et al.*, 8 Blackf. 99.

An injunction may be obtained by a mortgagee to restrain a mortgagor from committing such waste as may render unsafe the mortgage-debt.—*Gray* vs. *Baldwin et al.*, 8 Blackf. 164.

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Nuisance—what held to be—who may sue.

ARTICLE XXXIII.

For Nuisance.

What held to be a nuisance.

SEC. 628. Whatever is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. *

Who may sue

SEC. 629. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance.

SEC. 630. Where a proper case is made, the nuisance may be enjoined or abated, and damages recovered therefor.

*Where a mill is injured by obstructing the stream on which it stands, and suit is brought for the injury, that the mill-dam is a public nuisance is no defense to the suit.—*Haller et al.* vs. *Pine*, 8 Blackf. 175.

In a suit against a person for so obstructing a navigable river, as to cause a loss of the plaintiff's timber, &c., the right to recover must depend, not on the shape, &c, of the timber, but on the fact of the loss or injury to the plaintiff's property, such as it was, occasioned by the obstruction.—*Martin et al.* vs. *Bliss*, 5 Blackf. 35.

Nor can the plaintiff's belief or opinion, at the time, as to the practicability of passing the obstruction with his property, affect the defendant's responsibility for such loss or injury.—*Ibid.*

The erection of anything in the upper part of a stream of water, which poisons, corrupts, or renders it offensive or unwholesome, is actionable.—3 Rawle, 256.

The erection of a tan-yard comes within the operation of this principle, provided it has the effect of corrupting the water below, so as to be injurious to the other proprietors —*Ibid.*

The limitation of these principles is, either where there has been an appropriation for 20 years, which in law raises a presumption of right, or it arises from contract.—*Ibid.*

One who by a lease has a right to so much of the water of a stream as shall be needful and proper for the supply of a tan-yard and the working of a bark-mill, and who is bound to return all the water which he diverts for such purposes, over and above the quantity which would be necessarily used in the business, into a creek above a dam situate lower down the stream, has no right to return it polluted by admixture with substances of poisonous or unwholesome nature, to the injury of the lessor and those claiming under him.—*Ibid.*

A lease of a piece of ground for a tan-yard and bark-mill, with the use of so much of the water of a stream as may be necessary for conducting the business, does not carry with it the right to the lessee to empty the contents of his tan-yard into the stream, or to dispose of his surplus tan on the adjoining land of the lessor.—*Ibid.*

In an action for a nuisance in flowing water back upon the plaintiff's land by means of a mill-dam, the defendant may give evidence of a parol license from a former owner of the plaintiff's land.—4 Watts 317.

A parol license from a known agent of a foreign land company, to erect a mill-dam and flow the water back upon their lands, may be given in evidence in action for a nuisance, by a purchaser from the company.—*Ibid.*

In action for a nuisance in the erection of a mill-dam, thereby overflowing the plaintiff's land, his declarations, or those of any former owner of the land during his ownership, respecting the defendant's right to do so, may be given in evidence by the defendant.—*Ibid.*

See R. S. vol. 1, p. 259, the subject of easements.

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ARTICLE XXXIV.

Foreclosure of Mortgages.

When and where suit commenced.

SEC. 631. When default is made in the performance of any condition contained in a mortgage, the mortgagee or his assigns, may proceed in the court of common pleas or circuit court of the county where the land lies, to foreclose the equity of redemption contained in the mortgage.

When the remedy is confined to the property.

SEC. 632. When there is no express agreement in the mortgage, nor any separate instrument given for the payment of the sum secured thereby, the remedy of the mortgagee shall be confined to the property mortgaged.

Judgment of foreclosure.

SEC. 633. In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage-debt with interest and costs at any time before sale, shall satisfy the judgment.

When the remedy extends to other property.

SEC. 634. When there is an express written agreement for the payment of the sum of money secured, contained in the mortgage, or any separate instrument, the court shall direct in the order of sale that the balance due on the mortgage and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be levied of any property of the mortgage-debtor.

Sale of mortgaged premises.

SEC. 635. A copy of the order of sale, and judgment shall be issued and certified by the clerk, under the seal of the court, to the sheriff, who shall thereupon proceed to sell the mortgaged premises, or so much thereof as may be necessary to satisfy the judgment, interest and costs, as upon execution, and if any part of the judgment, interest and costs remain unsatisfied, the sheriff shall forthwith proceed to levy the residue of the other property of the defendant.

Plf. not to prosecute action on note and mortgage at the same time.

SEC. 636. The plaintiff shall not proceed to foreclose his mortgage while he is prosecuting any other action for the same debt or matter which is secured by the mortgage, or while he is seeking to obtain execution of any judgment in such other action; nor shall he prosecute any other action for the same matter, while he is foreclosing his mortgage, or prosecuting a judgment of foreclosure.*

When there are instalments due

SEC. 637. Whenever a complaint is filed for the foreclosure of a mortgage upon which there shall be due any interest, or instalment of the principal, and there are other instalments not due, if the defendant pay into court the principal and interest due, with costs, at any time before final

* See title "Mortgages," R. S. Vol. 2.

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judgment, the complaint shall be dismissed; if such payment be made after final judgment, proceedings thereon shall be stayed, subject to be enforced upon a subsequent default in the payment of any instalment of the principal, or interest thereafter becoming due. In the final judgment, the court shall direct at what time and upon what default any subsequent execution shall issue.

Property in such cases to be sold in parcels.

SEC. 638. In such cases after final judgment the court shall ascertain whether the property can be sold in parcels, and if it can be done without injury to the interest of the parties, the court shall direct so much only of the premises to be sold as will be sufficient to pay the amount then due on the mortgage, with costs, and the judgment shall remain and be enforced upon any subsequent default, unless the amount due shall be paid before execution of the judgment is perfected.

Or, the whole may be sold, when.

SEC. 639. If the mortgaged premises cannot be sold in parcels, the court shall order the whole to be sold, and the proceeds of the sale shall be applied, first to the payment of the principal due, interest and costs, and then to the residue secured by the mortgage and not due; and if the residue do not bear interest, a deduction shall be made therefrom by discounting the legal interest. And in all cases where the proceeds of sale shall be more than sufficient to pay the amount due and costs, the surplus shall be paid to the mortgage-debtor, his heirs or assigns.

Execution.

SEC. 640. Whenever an execution shall issue upon a judgment recovered for a debt secured by mortgage of real property, the plaintiff shall indorse thereon a brief description of the mortgaged premises, and the equity of redemption shall in no case be sold on such execution.*

* A bill to foreclose a mortgage executed by A., to secure the payment of a judgment obtained by the defendants against *B.* and *C.* *B.* entered his appearance, and died during the progress of the cause. His death being suggested, the suit was abated as to him. Default was made by *A.* and *C.*, and a decree was rendered *pro confesso*, against them. Held, that *B.* and *C.* were necessary parties, and that there should have been a bill of revivor against the representatives of *B.*—*Milroy et al.* vs. *Stockwell et al.*, 1 Carter's Ind. Rep. 35.

A., the holder of a bond for the conveyance of a certain tract of land, assigned said bond to *B.*, as a security for money advanced. *B.* permitted A. to place the bond in the hands of *C.*, to be held as collateral security for a debt which he owed him. While it was in the hands of *C.*, the assignment to *C.* was stricken out, without his knowledge, and a new assignment made to C., D. and E., to secure debts which *A.* owed them. *A.* paid the purchase money, and *C*, *D.* and *E.* procured the conveyance of the land from the obligor to themselves, and the bond was cancelled. *B.* filed his bill in chancery against *C.*, *D.* and *E.*, to set aside the conveyance, and vest the title in himself, and obtained a decree to that effect. It was proved that *A.* continued in possession of the land after the assignment to *B.*, offering to sell it with the knowledge and consent of *B.* Held, that the assignment to *B.* only amounted to an equitable security, or a mortgage for the advancement he had made. Held, also, that *B.* should have proceeded as in

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Mortgages—foreclosure of.

the case of a mortgage, and made *A.*, or his representatives, parties.—*St. John et al.* vs. *Freeman*, 1 Carter's Ind. Rep. 84.

A., the owner of land mortgaged it to *B.* Subsequently *C.* recovered a judgment against *A.* *A.* then mortgaged the land to *D.*, he having notice of the previous mortgage; afterwards, *D.* assigned his mortgage to *E.*; this assignee had no notice of the previous mortgage, and this mortgage was recorded on the same day the assignment was made. The land was subsequently sold on execution on said judgment to F., with notice of the mortgage held by B., and sheriff's deed made. After the sale, *F.* obtained from *E.* an assignment of the mortgage given to *D.* Held, that the previous mortgage was entitled to preference over the judgment and the second mortgage, and that the purchase at the sheriff's sale was subject to that mortgage.—*Com. of Sinking Fund* vs. *Wilson*, 1 Carter's Ind. Rep. 356.

The statute of 1848, in relation to mortgages, applies to mortgages executed before its passage.—*Doe* vs. *Woodward*, 1 Carter's Ind. Rep. 446.

As to dower in an equity of redemption, see *Nottingham et ux.* vs. *Calvert*, 1 Carter's Ind. Rep. 527.

The title of the mortgagor to land mortgaged by him to the commissioners of the sinking fund to secure a loan, and sold by them, vests in the purchaser, freed from all assessments and taxes made or levied between the date of the mortgage and the date of the deed.—*Hamilton, auditor, &c.* vs. *The State ex rel.*, &c., 1 Carter's Ind. Rep. 128.

An outstanding mortgage upon lands purchased, when a deed and possession accompany the sale, is no bar to a recovery of the purchase money.—*Oldfield* vs. *Stevenson*, 1 Carter's Ind. Rep. 153.

Parol evidence of the understanding of the parties to a mortgage at the time of its execution, that it should not prejudice a lien of a subsequent mortgage then about to be taken, is admissible to show the extent of the notice which the first mortgagee had of the pending negotiation as to the second mortgage.—*The State* vs. *Halloway et al.*, 8 Blackf. 45.

An objection of the lapse of time to showing fraud in a mortgage should be made in the court below.—*Ibid.*

The circumstance that *A.* authorized *B.* to fill up a blank in a mortgage from the former to *C.*, with a description of certain lands, does not give *C.* (the blank not being so filled,) a lien on the lands.—*Coquillard et al.* vs. *Suydam*, 8 Blackf. 24.

When a mechanic's lien accrues on premises previously mortgaged, the mortgage must be first satisfied.—*Troth et al.* vs. *Hunt*, 8 Blackf. 580.

To secure a debt of 2000 dollars due from W. to D., the former assigned to the latter two notes on B. of 1000 dollars each, and also mortgaged to him certain real estate. The debt, except 1100 dollars, being afterwards paid, D. gave up the assigned notes, and took W.'s notes for the 1100 dollars. Held, that the mortgage continued as a security for the last named sum.—*McCormick* vs. *Digby et al.*, 8 Blackf. 99.

If a mortgagee of real estate stand by at a sale of part of the premises by the mortgagor, acquiesce in the sale, and receive the consideration of the purchase, that part of the premises is thereby freed from the mortgage.—*Ibid.*

A judgment against a mortgagor is a lien on the equity of redemption of the land mortgaged, and after the discharge of the mortgage the lien is on the fee.—*Ibid.*

After a mortgagee has assigned the mortgage, he cannot discharge any part of the premises from the mortgage.—*Ibid.*

The words "mortgage, assign over, and transfer" in a deed, will pass the legal estate.—*Gambrie! et al.* vs. *Doe d. Rose*, 8 Blackf. 140.

See same case quoted in Vol. I, title "Interest," note to section touching illegal interest; also, the case of *Grimes et al.* vs. *Doe d. Shute*, 8 Blackf. 371.

On a decree of foreclosure and for a sale of the mortgaged premises, the sale should be made in conformity to the statute in force when the mortgage was executed.—*Franklin* vs. *Thurston*, 8 Blackf. 160.

A mortgage must be presumed to have been executed in this State, the contrary not appearing.—*Ibid.*

On the death of a mortgagor, the equity of redemption descends to his heirs.—*Shaw et al.* vs. *Hoadley*, 8 Blackf. 165.

And the surplus of a sale under a decree against the heirs in a suit to foreclose, &c., goes to them.—*Ibid.*

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Mortgages—foreclosure of.

A mortgagor who has conveyed the equity of redemption to a person who has assumed to pay the mortgage debt, need not be a party to a bill of foreclosure.—*Ibid.*

If a person mortgage several tracts of land, one of which he had previously conveyed to a third person by a deed duly acknowledged and recorded, such third person need not be a party to a bill of foreclosure on the mortgage.—*Comly et ux.* vs. *Hendricks*, 8 Blackf. 187.

If land mortgaged be sold under a decree of foreclosure, &c., the purchaser will be entitled to the crops growing at the time of sale, in preference to a person claiming under a mortgagor, and whose claims originated subsequently to the mortgage.—*Jones et al.* vs. *Thomas*, 8 Blackf. 428.

Five promissory notes, payable at different times, were secured by the same mortgage on real estate. The payee assigned to A. three of the notes, and he afterwards assigned the other two, with the mortgage, to B., who had no notice of the previous assignment to A. The notes assigned to B. became due before the others. Held, that the notes were payable, out of a fund arising from a sale of the property mortgaged, according to the order of time in which they fell due.—*The State Bank et al.* vs. *Tweedy et al.*, 8 Blackf. 447.

Where there is a foreclosure when part only of the mortgage-debt is due, interest should not be allowed on the part not due, beyond the time when the proceeds of the sale become applicable to the payment of such part.—*Greenman et al.* vs. *Pattison*, 8 Blackf. 465.

The assignee of a second mortgage filed a bill of forclosure, making B., the assignee of the first mortgage, one of the defendants. B. answered, praying for a sale of the mortgaged premises, and for a priority of payment. Held, that, in case of a sale, B. should be first paid.—*Troth et al.* vs. *Hunt*, 8 Blackf. 580.

If land, on which there is a mortgage, be sold with a covenant in the deed against incumbrances, the mortgage will be no defense to a suit for the purchase money, if there has been no eviction of the defendant, nor payment by him of any part of the mortgage-debt.—*Pomeroy* vs. *Burnett*, 8 Blackf. 142.

As to the right of the mortgagee to convey the mortgaged premises, under the statute of 1838, see *Givan* vs. *Doe d. Tout*, 7 Blackf. 210.

The sale of a promissory note seconded by a mortgage, is an equitable transfer of the mortgage to the purchaser of the note; and he should, therefore, be a party to a bill to foreclose.—*Burton* vs. *Baxter*, 7 Blackf. 297.

A mortgage of real estate to A. was, in his absence, and without his knowledge, signed and sealed by B., and delivered by him to the recorder of the proper county to be recorded; and C., afterwards, before the mortgagee had assented to the mortgage, obtained a judgment against the mortgagor. Held, that the judgment was entitled to the preference.—*Goodsell et al.* vs. *Stinson*, 7 Blackf. 437.

A subsequent mortgage of real estate, though first recorded, will not prevail against a prior one, which is not recorded in time, if the subsequent mortgagee had actual notice of the prior mortgage.—*Sparks et al.* vs. *The State Bank*, 7 Blackf. 469.

If a judgment be obtained against a person subsequently to his execution of a mortgage, but before the mortgage is recorded, the mortgage, though it was not recorded in time, will have preference. But, perhaps, a *bona fide* purchaser at sheriff's sale under the judgment, might be protected under the statute.—*Ibid.*

An absolute conveyance of real estate, and the grantee's bond of the same date for a reconveyance to the grantor on his payment of a certain sum of money, amount to a mortgage.—*Watkins* vs. *Gregory*, 6 Blackf. 113.

If the money in such case be duly paid, and the grantee refuse to reconvey, he is liable to a suit on the bond.—*Ibid.*

As to covenants for payment in a mortgage, see *Smith* vs. *Stewart*, 6 Blackf. 162.

As to mortgages of canal lands, held by certificate, see *Miller et al.* vs. *Tipton et al.*, 6 Blackf. 238.

A mortgagee of land who purchases the equity of redemption at sheriff's sale, thereby extinguishes the mortgage-debt to the extent of the value of the mortgaged premises, after deducting the sum paid for the equity of redemption.—*Murphy* vs. *Elliott*, 6 Blackf. 482.

A joint mortgage to two persons to secure debts due to them severally, may be foreclosed on a joint bill filed by the mortgagees.—*Shirkey* vs. *Hanna et al.*, 3 Blackf. 403.

The heir, and not the executor or administrator of a deceased mortgagor, is the

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proper party defendant to a bill for a foreclosure and sale of the mortgaged premises.—*Slaughter* vs. *Foust et al.*, 4 Blackf. 379.

The statute which prohibits the commencement of a suit against an executor or administrator, until the expiration of a year from the date of his appointment, does not apply to a bill for a foreclosure, &c., against the heir of the mortgagor.—*Ibid.*

In a bill of foreclosure, and for the sale of the land mortgaged, the premises must be so described that, should a sale be decreed, the officer may know on what land to enter to execute the order of the court.—*Whittlesey et ux.* vs. *Beall*, 5 Blackf. 143.

A mortgage given to secure payment of a debt by instalments, contained an agreement that on default in the payment of any one instalment, the whole debt should be then payable, subject to a deduction of interest from the payment of the money, to the time when it was to have been paid, had no default occurred. Held, that on the non-payment of any instalment when due, a bill of foreclosure might be filed. Held, also, that the liability to pay the whole debt, upon any such default, could not be considered as a penalty.—*Andrews* vs. *Jones et al.* 3 Blackf. 440.

A mortgage may be assigned, like other evidences of debt, by an endorsement without seal; a mere delivery of the mortgage security, with a transfer of the debt, is a sufficient assignment of the mortgage.—*Clearwater* vs. *Rose*, 1 Blackf. 137; *Blair* vs. *Bass*, 4 Blackf 539.

A bill was filed to redeem certain premises which the complainant had caused to be absolutely conveyed to the defendant. The bill averred that the deed was only intended to be a mortgage; but this averment was expressly denied by the answer. Held, that though the complainant might introduce parol testimony to show that a mortgage was intended, yet that the testimony must be very clear and decisive to enable him to succeed. Held, also, that evidence of the grantor's confessions, in such case, should be received with great caution—*Conwell et al.* vs. *Evill*, 4 Blackf. 67.

Proof in such case, that the property had cost the complainant about three times as much as he received for it from the defendant, and that the complainant had continued in possession for two years after the execution of the deed, was held not to be sufficient to warrant a presumption that the sale was not absolute, against the face of the deed and the defendant's answer.—*Ibid.*

As to a verbal condition to redeem, see *Blair* vs. *Bass*, 4 Blackf. 539. See *Harbison* vs. *Lemon et al.*, 3 Blackf. 193.

As to the construction of the statute of 1824, touching mortgages, see *Youse* vs. *McCreary*, 2 Blackf. 243; *Markle et al.* vs. *Rapp et al.*, 2 Blackf. 268.

A mortgagee, by his statement to a third person that his mortgage was discharged, having induced him to take a mortgage on the premises, cannot afterwards set up a claim to the mortgaged property, nor can his assignee with notice, to the prejudice of the second mortgage.—*Lassel e* vs. *Barnett et al.*, 1 Blackf. 150.

If land be conveyed in satisfaction of a mortgage, and the title afterwards prove defective, the defect may be the subject of a new demand, but cannot operate to revive the original contract, without the mortgagor's consent, nor can it with his consent to the prejudice of a mortgage taken by another in the intermediate time.—*Ibid.*

A. borrowed of *B.* 200 dollars; and, to secure the payment, assigned him the agent's certificate for a lot in Indianapolis, for which the purchase money had been in part paid. On the same day with the assignment, *B.* gave to *A.* a separate obligation, binding himself to re-assign the certificate to *A.* on payment of the loan with interest at the time stipulated. Held, that *B.* might consider the assignment, under the circumstances, as a mortgage, and, by a bill in equity, obtain a decree for a sale of the premises.—*Crumbaugh* vs. *Smock*, 1 Blackf. 305.

Bill of foreclosure. A mortgage of real estate, given to secure the payment to the complainant of a *bona fide* debt, was not recorded until about two years and a half after it was executed. After its execution, and before it was recorded, the mortgagor contracted debts with other persons, for which, but not until after the mortgage was recorded, judgments were obtained. There was no satisfactory evidence that the delay to have the mortgage recorded, proceeded from any collusion between the mortgagee and mortgagor to defraud the subsequent creditors. Held, that the mortgage was entitled to the priority.—*Scott et al.* vs. *M'Murran et al.*, 7 Blackf. 284.

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Joint-debtors—deceased judgment-defendants—mechanics' liens.

ARTICLE XXXV.

Proceedings to enforce Judgments against joint debtors and the real estate of deceased Judgment Defendants.

Summons to joint debtor.

SEC. 641. When a judgment shall be recovered against one or more persons jointly indebted upon contract as provided in section 41, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned.

Summons to heirs, &c.

SEC. 642. In case of the death of any judgment-debtor, the heirs, devisees or legatees of such debtor or the tenant of real property, owned by him and affected by the judgment, and the personal representatives of the decedent, may, after the expiration of one year from the time of granting letters testamentary, or of administration upon the estate of the decedent, be summoned to show cause why the judgment should not be enforced against the estate of the judgment-debtor, in their hands respectively.

Affidavit.

SEC. 643. The judgment-creditor, his representatives or attorney, shall file an affidavit that the judgment has not been satisfied, to his knowledge, or information and belief and shall specify the amount due thereon, and the property sought to be charged.

Summons, what to contain

SEC. 644. The summons shall describe the judgment, and require the person summoned to show cause, on the first day of the next term of the court, and shall be issued, served and returned in like manner as a summons in an original action.

Service, and defense.

SEC. 645. The party summoned, after the summons has been served ten days before the first day of any term of the court, may answer, denying the judgment, or setting up any defense which may have arisen subsequently, or suffer a default; and in addition thereto, if he be proceeded against according to section 641, he may make the same defense which he might have originally made to the action and no other.

Pleadings.

SEC. 646. The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply, and the pleadings shall be verified in like cases and manner as in an action, and issues may be tried, and judgment rendered and enforced by execution.

ARTICLE XXXVI.

To enforce Mechanics' liens on Buildings.

Who may have lien, and upon what.

SEC. 647. Mechanics, and all persons performing labor, or furnishing materials for the construction or repair of any building, or who may have furnished any engine or other

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machinery for any mill, distillery or other manufactory may have a lien separately or jointly upon the building which they may have constructed or repaired, or upon any buildings, mill, distillery, or other manufactory for which they may have furnished materials of any description and on the interest of the owner in the lot or land on which it stands, to the extent of the value of any labor done or materials furnished, or for both.*

Not to extend to tenants.

SEC. 648. The provisions of this act shall only extend to work done or materials furnished on new buildings, or to a contract entered into with the owner of any building for repairs, or to the engine or other machinery furnished for any mill, distillery or other manufactory, unless furnished to the owner of the land on which the same may be situate, and not to any contract made with the tenant, except only to the extent of his interest.

Sub-contractor, journeyman or laborer.

SEC. 649. Any sub-contractor, journeyman or laborer employed in the construction or repair or furnishing materials for any building, may give to the owner thereof notice in writing, particularly setting forth the amount of his claim, and service rendered for which his employer is indebted to him, and that he holds the owner responsible for the same; and the owner shall be liable for such claim, but not to exceed the amount due from him to the employer at the time of notice, which may be recovered in an action.

Notice.

SEC. 650. Any person wishing to acquire such lien upon any property, whether his claim be due or not, shall file in the recorder's office of the county, within sixty days after the completion of the building or repairs, notice of his intention to hold a lein upon such property for the amount of his claim, specifically setting forth the amount claimed, and the recorder shall record the notice when presented, in a book to be kept for that purpose, for which he shall receive twenty-five cents.

Complaint.

SEC. 651. Any person having such lien, may enforce the same by filing his complaint in the circuit court or court of

* See title "Liens," 1st Vol. R. S., and notes.

If a mechanic's lien accrue after the employer's marriage, and the employee die after the accruing of the lien, the right of dower of the employer's wife will be paramount to the lien.—*Pifer* vs. *Ward et al.*, 8 Blackf. 252.

Older incumbrances must first be removed.—*Close et al.* vs. *Hunt*, 8 Blackf. 254.

A mechanic's lien is not waived by taking his employer's note for the money due for the work, and a receipt in full for such money, the note not being paid. —*Goble* vs. *Gale et al.*, 7 Blackf. 218.

See same case as to the effect of a mechanic's giving credit for part of his claim.

The statute respecting the liens of mechanics and others on buildings, embraces floating wharves for receiving, storing and forwarding merchandise.—*Olmstead et al.* vs. *McNall et al.*, 7 Blackf. 387.

See *McKinney* vs. *Springer et al.*, 6 Blackf. 511; *Robinson et al.* vs. *Marray et al.*, 5 Blackf. 329.

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common pleas of the county where the work was done, or materials furnished at any time within one year from the completion of the work or furnishing the materials; or, if a credit be given, from the expiration of the credit.

Proceedings.

SEC. 652. In such actions, all persons whose liens are recorded, as herein provided, may be made parties, and issues shall be made up, and trials had, as in other cases; and the court may, by the judgment, direct a sale of the land and building for the satisfaction of the liens and costs: such sale to be without prejudice to the rights of any prior incumbrancer, owner or other persons not parties to the action. If several such actions be brought by different claimants, and be pending at the same time, the court may order them to be consolidated.

Claims paid *pro rata*.

SEC. 653. If the proceeds of the sale be insufficient to pay all the claimants, then the court shall order them to be paid in proportion to the amount due each.

Bond of defendant.

SEC. 654. In all proceedings commenced under this chapter [article] the defendant may file a written undertaking, with surety, to be approved by the court, to the effect that he will pay the judgments that may be recovered, and costs, and thereby release his property from the liens hereby created.

ARTICLE XXXVII.

To enforce liens on boats and other water crafts.

For what liable

SEC. 655. All boats, vessels, and water crafts of every description, found in the waters of this State are liable:

First. For all debts contracted by the master, owner, agent, clerk or consignee thereof, on account of supplies furnished for the use of the same,—on account of work done or services rendered for the same, by boatmen or mariners, or any other persons, or on account of work done or materials furnished in building, repairing, fitting out, furnishing or equipping such boat vessel or water craft.

Second. For all demands or damages arising out of any contract of affrieghtment, or any wilful or negligent act of the master, owner or agent thereof, done in connection with the business of such boat, vessel or water craft, or any contract relative to the transportation of persons or property, entered into by the master, owner, agent, clerk or consignee thereof.

Third. For all injuries to persons or property by such

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boat, vessel or water craft, or by the officers or crew, done in connection with the business of the same.*

To what lien attaches.

SEC. 656. Claims growing out of the above causes, are liens upon the boat, vessel or water craft, their apparel, tackle, furniture and appendages, including barges and lighters, belonging to the owners of the boat, vessel or water craft, and used therewith at the time the action is commenced.

To be preferred to other claims.

SEC. 657. Such liens shall take preference of any claims against the boat itself, or all or any of its owners, masters, or consignees, growing out of any other causes than those above enumerated; and as between themselves, mariners and boatmens' wages shall be first preferred.

Complaint.

SEC. 658. Any person aggrieved, may have an action, against such boat, vessel or water craft, in the county where the same may be found, or the owners thereof, to enforce any such lien; and if the complaint in such action shows the particulars of the demand, the amount due, and a demand made upon the owner, master, clerk or consignee thereof, and refusal of payment, and verified by the affidavit of the plaintiff, or other person in his behalf, an order of attachment shall be issued by the clerk against the boat, vessel, or other water craft, and the tackle and furniture thereof, which shall be directed, executed and returned as an order of attachment in other cases.

Who may join in complaint.

SEC. 659. In all actions contemplated in the foregoing section, all or any of the persons having demands of the description therein mentioned, may join in a complaint against such boat or vessel, either at the commencement of the action, or at any time afterwards, before judgment upon filing the requisite complaint and affidavit.

SEC. 660. In such actions, proceedings shall be had, judgment rendered and enforced by execution, or other proper means.

Defendant's bond.

SEC. 661. If the defendant, or master, owner or consignee, shall, before final judgment, give a written undertaking payable to the plaintiff, with surety to be approved by the clerk or sheriff, to the effect that the defendant will perform

* The statute giving a lien on boats and other vessels for construction, repairs, &c., applies exclusively to vessels intended for navigation.—*Olmstead et al. vs. McNall et al.*, 7 Blackf. 387.

The person who builds a boat, &c., agreeably to his contract with the owner, &c., has a lien on the boat, under the statute, for the price, whether he has paid the workmen that assisted him and were employed by him or not; but the workmen so employed by the contractor have no such lien for their wages.—*Southwick vs. The Packet Boat Clyde*, 6 Blackf. 148.

Whether in such case, evidence of an unsuccessful attempt by the contractor and the owner to settle, is sufficient to show the demand and refusal of payment required by the statute, is not for the court, but for the jury to determine.—*Ibid.*

The contractor in such case can only recover, in the absence of a special contract, the value of the work, &c., at the place where the boat was built; the performance of which work, &c., must be proved.—*Ibid.*

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the judgment of the court, the attachment shall be discharged and restitution made of the boat or vessel.

Service of summons.

SEC. 662. In cases arising under section 655, the summons may be served upon the officer or consignee making the contract; if they cannot be found, upon the clerk, or if he cannot be found, upon any other officer of the boat, vessel, or water craft, or any person having charge thereof; if that cannot be done, by affixing a copy of the summons in some conspicuous place in the boat or vessel.

Before whom action is brought.

SEC. 663. The action may be brought before any justice of the peace in the county where the boat, vessel, or other water craft is found, when the amount claimed is within his jurisdiction, and in such actions justices of the peace shall have the powers and perform the duties prescribed for clerks and courts, and constables shall have the powers and perform the duties of sheriffs.

ARTICLE XXXVIII.

Ne Exeat.

Affidavit.

SEC. 664. Actions may be commenced upon any agreement in writing, before the time for the performance of the contract expires, when the plaintiff or his agent shall make and file an affidavit with the clerk of the proper court, that the defendant is about to leave the State without performing or making provisions for the performance of the contract, taking with him property, moneys, credits or effects, subject to execution, with intent to defraud the plaintiff.

Order of arrest and bail, and plaintiff's bond.

SEC. 665. Upon such affidavit being filed, the clerk shall issue an order of arrest and bail, directed to the sheriff, which shall be issued, served and returned, in all respects, as such orders in other cases; before such order shall issue, the plaintiff shall file in the office of the clerk, a written undertaking, with sufficient surety, to be approved by the clerk, to the effect that the plaintiff will pay the defendant such damages and costs as he shall wrongfully sustain by occasion of the suit.

Defendant's recognizance.

SEC. 666. The sheriff shall require the defendant to enter into a recognizance of special bail, with sufficient surety, personally to appear on the first day of the court, at its next term and abide the order of court, and in default thereof, the defendant shall be committed to prison until discharged in due course of law; such special bail shall be liable for the principal, and shall have a right to arrest and deliver him up as in other cases, and the defendant may give other bail.

When deft. may be discharged.

SEC. 667. Instead of giving special bail, as above provided, the defendant shall be entitled to his discharge from custody,

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if he will secure the performance of the contract to the satisfaction of the plaintiff.

Who may have proceeding.

SEC. 668. This proceeding may be had in favor of any surety, or other person jointly bound with the defendant; it may also be prosecuted by the person in whose favor the contract exists, against any one or more of the persons bound thereby, upon filing such affidavit. When the co-contractors are non-residents, or probably insolvent, or, at the request of any one of them, when they are residents and solvent.

Habeas corpus.

SEC. 669. The defendant may have the same remedy by writ of *habeas corpus* as in other cases of arrest and bail.

SEC. 670. The proceedings may be had before justices of the peace in all cases within their jurisdiction.

SEC. 671. The affidavit and written undertaking may be filed, and proceedings had in any county where the defendant may be found.

ARTICLE XXXIX.

Remedies of Sureties against their Principals.

Notice.

SEC. 672. Any person bound as surety upon any contract in writing for the payment of money, or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract.

Surety, when discharged.

SEC. 673. If the creditor or obligee shall not proceed within a reasonable time to bring his action upon such contract, and prosecute the same to judgment and execution, the surety shall be discharged from all liability thereon.

Trial of suretyship, when.

SEC. 674. When any action is brought against two or more defendants upon a contract, any one or more of the defendants being surety for the others, the surety may, upon a written complaint to the court, cause the question of suretyship to be tried and determined, upon the issue made by the parties, at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceedings shall not affect the proceedings of the plaintiff.

Order of court.

SEC. 675. If the finding upon such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution first upon and exhaust the property of the principal, before a levy shall be made upon the property of the surety; and the clerk shall indorse a memorandum of the order on the execution.

In what cases judgment to remain open for the benefit of sureties, &c.

SEC. 676. When any defendant-surety in a judgment or special bail or replevin-bail, or surety in a delivery-bond or replevin-bond, or any person being surety in any undertaking whatever, has been or shall be compelled to pay any judg-

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ment or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, or when any sheriff or other officer, or any surety upon his official bond, shall be compelled to pay any judgment or any part thereof, by reason of any default of such officer, except for failing to pay over money collected, or for wasting property levied on, the judgment shall not be discharged by such payment, but shall remain in force for the use of the bail, surety, officer, or other person making such payment, and after the plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use.*

Remedy against co-defendant, &c.

SEC. 677. Any one of several judgment-defendants, and any one of several replevin-bail, having paid and satisfied the plaintiff shall have the remedy provided in the last section against the co-defendants or co-sureties, to collect of them the rateable proportion each is equitably bound to pay.

Surety, when not to confess judgment.

SEC. 678. No surety or his representatives shall confess judgment, or suffer judgment by default, in any case where he is notified that there is a valid defense, if the principal will enter himself defendant to the action, and tender to the surety or his representative good security to indemnify him, to be approved by the court.

In case of a waiver of valuation and app't laws.

SEC. 679. Whenever any person seeks a remedy against another, for whom he has discharged a debt, or claim upon

*The discharge of a promissory note by a surety by joining his own note not negotiable by the law-merchant, and which he has not paid, does not authorize him to sue his principal for money paid.—*Pitzer* vs. *Harmon*, 8 Blackf. 112.

The gratuitous giving of time by a creditor to his principal debtor does not discharge the surety, though the latter had verbally notified the creditor to sue the principal who was then solvent, but who afterwards became insolvent.—*Curr* vs. *Howard et al.*, 8 Blackf. 190. Same point decided in *Tate* vs. *Wymond*, 7 Blackf. 240.

Time given to a principal debtor, by a parol contract, does not at law discharge the surety from a specialty debt.—*Ibid.*

The admission of certain facts by a principal obligor, in which he and his sureties were jointly interested, is admissible evidence against them all.—*Parker et al.* vs. *The State*, 8 Blackf. 292.

Parol evidence is not admissible to vary recognizance of bail.—*Murphy et al.* vs. *Murry*, 8 Blackf. 295.

If in an appeal to the circuit court from a justice's judgment against two persons, the appellee, by consent of parties, take judgment against one of the appellants without the consent of the surety in the appeal-bond, the surety is discharged.—*Shimer* vs. *Hightshur*, 7 Blackf. 238.

See *Hommell* vs. *Gamewell*, 5 Blackf. 5.

A sealed note executed in the name of a firm of "*Is. V. Harter & Co.*," purports to bind only Harter; and a third person, therefore, executing such note as surety, supposing it to be the note of the firm, cannot complain that a fraud was practiced on him, though the note was for the private debt of Harter.—*Harter et al.* vs. *Moore*, 5 Blackf. 367.

The defense of a surety, that the creditor has given time to the principal, &c., is not valid, unless it appear that the agreement for delay was founded on a valid consideration.—*Ibid.*

The mere delay of a creditor in not proceeding against the principal debtor, is no defense to a suit against a surety.—*Naylor* vs. *Moody et al.*, 3 Blackf. 92.

See *Barker* vs. *McClure*, 2 Blackf. 14.

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contract in whole or in part, made payable without any relief from valuation or appraisement laws, for which he was bound as surety or otherwise, the remedy of such person shall also be enforced without any relief from such laws.

SEC. 680. The foregoing provisions of this chapter [article] shall extend to heirs, executors and administrators of deceased persons; but the provisions of the 672d section shall not operate against persons under legal disabilities.

ARTICLE XL.

Against Foreign Corporations.

When and by whom brought.

SEC. 681. Actions may be brought against a corporation created by or under the laws of any other State, government or country, in any court having jurisdiction of the amount demanded by any person having a cause of action in any county within the State, where any property, moneys, credits or effects belonging or due to the corporation may be found.

Special Proceedings.

Parties.

SEC. 682. The party procuring a special proceeding, shall be known as the plaintiff, and the adverse party as the defendant.

ARTICLE XLI.

Assessment of Damages.

Ad quod damnum.

SEC. 683. The writ heretofore known as the writ of *ad qod damnum*, shall hereafter be known as the writ of assessment of damages.

When and how had.

SEC. 684. A writ of assessment of damages may be had by application to the circuit court or court of common pleas of the county where the damages to be assessed may be occasioned, under the regulations and in the cases following:

First. By any person owning the land on one side of a water course upon which he desires to erect a mill or other machinery to be propelled by water, to authorize him to take and assess the value of a portion of land on the opposite bank, not exceeding one acre belonging to another person whereon to abut a dam to be erected across the water course.

Second. To take and assess the value of such portion of the land in a like case, upon which a mill dam has been abutted with the consent of the owner.

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Third. To assess the probable amount of damages to the lands, creek or spring of another, or the improvements thereon, by the overflow of water or otherwise, which may be occasioned by any mill dam already erected, or proposed to be erected.

Fourth. To assess the damages which may be occasioned to any person by the waters of any river, creek or spring becoming stagnant by means of any mill dam already erected or proposed to be erected.

Fifth. To authorize the removal of obstructions in the race and water course below any mill, and assess the damages to be occasioned thereby, if any.

Sixth. To determine the height to which any person about to build, or having built a dam may raise the same at any time, without causing back water to flow upon any other mill works situated above on the same water course.

Seventh. To authorize any person being owner of a dam across any water course, or having a right to build such dam, for the purpose of propelling a mill or other machinery by water, upon his own land situated below the dam, where there is intermediate land of another person, to make a race, excavation or embankment, through such intermediate land.

Eighth. To authorize any person to divert water at his own dam, or upon his own land, from the bed of any water course in which any other person has an interest, for the purpose of using the water in propelling machinery upon the land of the person diverting it.

Ninth. To authorize any person injured in any manner by a mill dam already built, to have the damages assessed or the dam declared a nuisance, as the case may require.

Complaint, what to contain

SEC. 685. The plaintiff shall particularly describe the locality of his mill and dam, also, the lands upon which he desires the damages to be assessed, the object contemplated as the case may require, and the full name and residence of any person legally interested, or in whose favor damages may be assessed, and make them defendants.

Jury.

SEC. 686. The jury shall consist of disinterested freeholders, not less than six, nor more than twelve, the number to be fixed by the court; but no person owning land adjoining that upon which the damages are to be assessed, or upon which the mill may be situated, shall serve as juror.

When jury may meet upon the land.

SEC. 687. Upon the application being made, the court may order the clerk to issue a writ, reciting the material part of the application, and directing the sheriff to impannel a jury to meet upon the land described in the application, on a day to be fixed by the sheriff, who shall give to the plaintiff and defendant ten days' notice, if they reside within the State; if not, then to their agent or attorney, if any reside

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in the county; if not, then notice may be given by publication, as in case of non-residents.

Duties of jury. SEC. 688. When the jury are impanneled and sworn, having met at the place designated, they shall be charged by the sheriff as to each duty required of them; and they shall to the best of their skill and judgment, and according to the exigency of the case when required,*

First. View and assess at its true value the land proposed for an abutment, and set off the same, not exceeding one acre, by metes and bounds.

Second. Examine the lands above and below the dam, the property of the defendants described in the writ, and report whether the lands, mansion house, gardens, or any improvements or appurtenances thereto belonging, will be overflowed or otherwise injured, and assess the amount of damages, if any.

Third. They shall inquire whether the navigation of the stream will be obstructed, and the health of the neighborhood annoyed or injured, and if so by what means the obstructions, annoyance and injury can be prevented.

Fourth. Whether such proposed mill or machinery will be of public utility.

Fifth. Assess the damages which may be occasioned by constructing a race, excavation or embankment through the intermediate lands of another.

Sixth. Assess the damages which may be occasioned by diverting the water from the bed of a water course.

Seventh. Assess any other damages that may be sustained by any defendant.

Infants. SEC. 689. When any of the parties to be affected by the application, are infants, they shall appear by a guardian appointed by the court.

Surveyor may be employed. SEC. 690. The sheriff shall, when the court so directs, employ the county surveyor, or some other competent surveyor, to assist the jury in determining any height, distance or quantity of land, or any other fact necessary to be determined by the jury.

Challenge of jurors, &c. SEC. 691. Either party may challenge jurors, and compel the attendance of witnesses to testify as to any matters to be

* If an assessment of damages on a writ of *ad quod damnum* be proved to be too high or too low, the circuit court may set it aside and order a new assessment.—*Chapman vs. Groves et al.*, 8 Blackf. 308.

An assessment of damages under a writ of *ad quod damnum* may be objected to by the defendant, on the ground that the damages are insufficient; and the question as to the validity of the objection will be for the court, and not for a jury to determine.—*Peck et al.* vs. *Van Rensselaer*, 8 Blackf. 312.

In a case of *ad quod damnum*, in relation to the erecting or the continuing of a mill-dam, the petition, the writ, and the inquest, or at least the latter, should name all the proprietors of the land, both above and below the site of the dam, who may be or have been, in any way, injured by the dam.—*Honinetine* vs. *Vaughn et al.*, 7 Blackf. 520.

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determined upon by the jury, in like manner as in the trial of civil actions.

Parties may point out, &c.

SEC. 692. Either party may attend and point out to the jury the place where the mill and dam are to be situated,—the high water and low water marks, and the local extent of the supposed injury to the land.

SEC. 693. The jury shall in all cases inspect the localities described in the writ.

Sheriff may adjourn, &c.

SEC. 694. If, from any cause the inquest cannot be held on the day fixed, the sheriff may adjourn to, or fix any subsequent day, previous to the return day; and the inquest may be adjourned from day to day, or to a future day, previous to the return day, when necessary.

Inquest.

SEC. 695. The inquest shall be signed by the jurors, and forthwith returned by the sheriff to the office of the clerk of the court.

Return.

SEC. 696. The sheriff shall show in his return the service of the notice required, and no person shall be bound by the proceedings, unless named in the writ and notified.

Defense.

SEC. 697. Any defendant may appear and traverse any material fact therein stated in the inquest, or he may plead or show any valid matter in bar of the right of the plaintiff to have the benefit of such writ, and issues of law and of fact may be made up and tried, and the court may adjudge costs therein, and proceedings had as in other actions.

Judgment and execution.

SEC. 698. The court may render judgment and issue execution for any amount of damages assessed by the jury against any such person owning or wishing to build any mill or mill dam, in favor of the party entitled to damages, if desired by the party thus entitled.

When grounds are overflowed, and health prejudiced.

SEC. 699. If it shall appear on the inquest or other evidence, that any mill curtilage or garden of any person will be, or has been, overflowed or injured, or the health of the neighborhood annoyed, the court shall not give leave to build the mill dam, but if none of those injuries have accrued, nor will likely accrue, the court may allow the application, if otherwise proper.

When the dam has been erected.

SEC. 700. In case of an application by any person, after having erected his mill dam, no damages shall be allowed, and the application shall be dismissed, unless the case be such, that leave would have been given to build a mill, if the application had been filed before the erection of the mill dam.*

* On such writ, issued after the dam was built, damages were assessed and not objected to. The court gave judgment on the assessment, and ordered that, on payment of the damages and costs, the petitioner should "have leave to continue his dam, and to flow such lands as thus were flowed by said dam at the time of said inquest." Held, that this order could not be complained of by the petitioner. —*Chapman* vs. *Groves et al.*, 8 Blackf. 308.

The writ was issued in a case where the petitioner's mill-dam, previously built,

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Ad quod damnum—tender of damages—back-water—embankments.

SEC. 701. Water shall not be diverted from the bed of any water course, by the authority of this act, to the injury of any mill or machinery already erected, or in the process of erection.

Tender of damages, seizure of ground, and limitation.

SEC. 702. The plaintiff shall not be invested with any rights under these proceedings until he pays or tenders the damages assessed, which must be done within one year after the assessment is confirmed, and not afterwards. On payment being made, he shall be seized in fee simple, of the land appropriated for abutting a dam, or for a race, excavation or embankment. If he fails to complete the mill and dam, or race, excavation or embankment, within three years after the inquest is confirmed, or to put the same in repair fit for use, within two years after being destroyed or injured, such land shall revert to its original owner, his heirs or assigns. If, at the time of destruction or injury, the owner is under legal disabilities, he may repair the premises within two years after the disability is removed.*

SEC. 703. Any assessment of damages confirmed by the court, and paid within a year after confirmation, shall bar a recovery for the same in any other action.

Where the water is backed up on another's land.

SEC. 704. Where the water, backed up by any mill dam, is about to break the banks of the stream, so as to turn the water thereof out of its ordinary channel, whereby such mill or machinery will be injured, the owner or occupier thereof, if he do not own such banks, or the lands lying contiguous, may, if necessary, enter thereon, and erect and keep in repair such embankments and other works as shall be requisite to prevent such injury, committing no unnecessary waste or damage. But the owner of the bank may recover the actual damages sustained.

Damages for destroying embankment.

SEC. 705. If any person shall injure, destroy or remove any such embankment or other works, the owner or occupier

caused land of the defendant's to be overflowed. The inquest was favorable to a continuance of the dam, and gave the defendant damages for the injury to his land. Plea, a decree in chancery in the defendant's favor, enjoining the petitioner forever from causing, by his dam, the overflowing of the defendant's premises, &c. Held, that the plea was insufficient.—*Peck et al.* vs. *Van Rensselaer*, 8 Blackf. 312.

The inquest in case of a writ of *ad quod damnum*, must distinctly state whether, in the opinion of the jury, the health of the neighborhood will be annoyed by the stagnation of the water which the contemplated dam may occasion.—*Gherkey* vs. *Haines*, 4 Blackf. 159.

* Unless the damages assessed under a writ of *ad quod damnum* be paid, the assessment will not affect the remedy of the injured party for an injury which was not foreseen or estimated by the jury.—*Smith* vs. *Olmstead*, 5 Blackf. 37.

Although before the erection of a mill-dam, the owner of the mill have the damages assessed under a writ of *ad quod damnum*, the assessment will not affect the remedy of the injured party for an injury which was not foreseen or estimated by the jury.—*Ibid.* See same point, in *Summy* vs. *Mulford*, 5 Blackf. 202.

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of the mill or machinery may recover of such person all damages which he may sustain by reason of such injury, destruction or removal.

Writ for benefit of canal, railroad Co., &c.

SEC. 706. When any person, corporation, or company, design to construct a canal, or railroad, or turnpike, graded, McAdamized, or plank road, or bridge, or establish a ferry, as a work of public utility, although for private profit, being authorized by law to take real property therefor, such person, corporation or company, may have a writ of assessment of damages.

Application, and issue of writ.

SEC. 707. Such person, corporation, or company, may file an application for a writ in the circuit court, or court of common pleas, or in vacation in the office of the clerk thereof, setting forth the precise description of the real estate desired to be taken, the names of the persons interested therein, making them defendants, and the purposes to which the same is to be converted, and refer to the law which authorizes the taking of the property. The clerk shall thereupon issue to the sheriff, a writ of assessment of damages, reciting therein the material part of the application, and direct the sheriff to assess the damages by a jury.

Jurors.

SEC. 708. The court, upon the application, or the clerk in vacation, shall determine the number of jurors at not less than six nor more than twelve, who shall be disinterested free-holders, not owning land within one mile of any part of the public way, for which the land is taken.

Inquest.

SEC. 709. The sheriff shall proceed to hold the inquest, and his proceedings thereon, and the rights of the parties, and the persons interested, and the duty of the jurors, and their proceedings, shall be in all respects according to the provisions of this chapter [article,] as far as the same are applicable.

Same proceedings may be had by the person injured.

SEC. 710. Any person having an interest in any land which has been or may be taken for any such public work, may have the benefit of this writ upon his own application, made as above provided, upon which like proceedings shall be had as in case of applications made by the corporation, company, or person prosecuting the work.

No deduction.

SEC. 711. In estimating any damages under this chapter [article], no deduction shall be made for any benefit that may be supposed to result to the owner, from the contemplated work.

Oaths.

SEC. 712. The sheriff shall administer the proper oaths to the jurors, surveyor and witnesses, in all cases contemplated by this chapter [article.]

Costs.

SEC. 713. Costs shall be awarded in all these cases, as in civil actions.

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ARTICLE XLII.

Habeas Corpus.

To whom granted.

SEC. 714. Every person restrained of his liberty, under any pretence whatever, may prosecute a writ of *habeas corpus* to inquire into the cause of the restraint, and shall be delivered therefrom when illegal.

Complaint,

SEC. 715. Application for the writ shall be made by complaint, signed and verified either by the plaintiff, or by some person in his behalf, and shall specify,

First. By whom the person in whose behalf the writ is applied for is restrained of his liberty; and the place where; naming all the parties, if they are known, or describing them if they are not known;

Second. The cause or pretence of the restraint, according to the best of the knowledge and belief of the applicant;

Third. If the restraint be alleged to be illegal, in what the illegality consists.*

By whom granted.

SEC. 716. Writs of *habeas corpus* may be granted, by the supreme court, circuit court, or court of common pleas, or by any judge of either court, whether in term or vacation, and upon application the writ shall be granted without delay.

Writ.

SEC. 717. The writ shall be directed to the officer or party having the person under restraint, commanding him to have such person before the court or judge, at such time and place as the court or judge shall direct, to do and receive what shall be ordered concerning him, and have then and there the writ.

* A petition which was sworn to for a writ of *habeas corpus*, stated that the petitioner was the guardian, &c., of a certain infant; that the infant was the daughter of one A., deceased, and his wife Abigail, who had, after her said husband's death, married Lorenzo D. Hovey; that the infant was, by said Lorenzo and wife, illegally restrained of her liberty, and detained from the custody of the petitioner. The petition prayed that the writ be directed to said Lorenzo and wife, commanding, &c. The writ was granted accordingly. Held, that the facts stated in the petition, (which were admitted by a demurrer to be true,) were sufficient to authorize the issuing of the writ.—*Hovey et ux.* vs. *Morris*, 7 Blackf. 559.

When a *habeas corpus* issues on a complaint of illegal imprisonment, the judge who issues the writ may, if the authority by which the prisoner is detained be defective, call before him witnesses, inquire into the guilt of the prisoner, and remand, recognize or discharge him, as he may think proper.—*The State* vs. *Best et al.*, 7 Blackf. 611.

The judge before whom a person is brought by *habeas corpus*, for the purpose of giving bail, may exercise his own discretion as to the amount of the penalty of the recognizance, without regard to the amount fixed by the magistrate who committed the prisoner.—*Ibid.* See Kent's Com. 26.

Neither the supreme court, nor any other court of the United States, has authority to issue a *habeas corpus* for a person imprisoned or in custody under the sentence, or held under an execution issued by a court of any State. A *habeas corpus ad testificando* may be issued to bring up such a person.—*Exparte Dorr*, 3 Howard, 624.

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Habeas corpus—service—return—proceedings—determination.

SEC. 718. If the writ be directed to the sheriff it shall be delivered by the clerk to him without delay.

SEC. 719. If the writ be directed to any other person, it shall be delivered to the sheriff, and shall be by him served by delivering the same to such person without delay.

SEC. 720. If the person to whom such writ is directed cannot be found, or shall refuse admittance to the sheriff, the same may be served by leaving it at the residence of the person to whom it is directed, or by affixing the same on some conspicuous place, either of his dwelling house or where the party is confined or under restraint. Service.

SEC. 721. The sheriff or other person to whom the writ is directed, shall make immediate return thereof, and if he refuse after due service to make return, the court shall enforce obedience by attachment.

SEC. 722. The return must be signed and verified by the person making it, who shall state, Return, what to contain.

First. The authority or cause of the restraint of the party in his custody.

Second. If the authority be in writing, he shall return a copy and produce the original on the hearing.

Third. If he has had the party in his custody or under his restraint, and has transferred him to another, he shall state to whom, the time, place and cause of the transfer. He shall produce the party on the hearing, unless prevented by sickness or infirmity, which must be shown in the return.

SEC. 723. The court or judge if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced; or for other good cause. The plaintiff may except to the sufficiency of, or controvert the return or any part thereof, or allege any new matter in avoidance; the new matter shall be verified, except in cases of commitment on a criminal charge; the return and pleadings may be amended without causing any delay. Proceedings.

SEC. 724. The court or judge shall thereupon proceed in a summary way to hear and determine the cause; and if no legal cause be shown for the restraint, or for the continuation thereof, shall discharge the party. Determination

SEC. 725. No court or judge shall inquire into the legality of any judgment or process, whereby the party is in custody, or discharge him when the term of commitment has not expired in either of the cases following: In what cases court not to discharge.

First. Upon process issued by any court or judge of the United States, where the court or judge has exclusive jurisdiction; or,

Second. Upon any process issued on any final judgment of a court of competent jurisdiction; or,

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Third. For any contempt of any court, officer, or body having authority to commit; but an order of commitment as for a contempt, upon proceedings to force the remedy of a party is not included in any of the foregoing specifications.

Fourth. Upon a warrant issued from the circuit court or court of common pleas, upon an indictment or information.

Certain defects to be disregarded.

SEC. 726. No person shall be discharged from an order of commitment issued by any judicial or peace officer for want of bail or in cases not bailable, on account of any defect in the charge or process, or for alleged want of probable cause; but in all such cases the court or judge shall summon the prosecuting witnesses, investigate the criminal charge, and discharge, let to bail, or recommit the prisoner, as may be just and legal, and recognize witnesses when proper.

Bail.

SEC. 727. The writ may be had for the purpose of letting a prisoner to bail in civil and criminal actions.

Notice.

SEC. 728. When any person has an interest in the detention, the prisoner shall not be discharged until the person having such interest is notified.

Witnesses.

SEC. 729. The court or judge shall have power to require and compel the attendance of witnesses, and to do all other acts necessary to determine the case.

SEC. 730. No sheriff or other officer shall be liable to a civil action for obeying any writ of *habeas corpus* or order of discharge made thereon.

When prisoner is about to be carried out of the State, &c.

SEC. 731. Whenever it shall appear by affidavit that any one is illegally held in custody or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause a warrant to be issued, reciting the facts and directed to the sheriff or any constable of the county, commanding him to take the person thus held in custody or restraint, and forthwith bring him before the court or judge, to be dealt with according to law.

Person restraining may be apprehended.

SEC. 732. The court or judge may also, if the same be deemed necessary, insert in the warrant a command for the apprehension of the person charged with causing the illegal restraint.

Service.

SEC. 733. The officer shall execute the writ by bringing the person therein named before the court or judge, and the like return and proceedings shall be required and had as in case of writs of *habeas corpus.*

Temporary orders.

SEC. 734. The court or judge may make any temporary orders in the cause or disposition of the party, during the progress of the proceedings, that justice may require. The

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Habeas corpus—for whom—*mandamus*—by and to whom and upon what issued.

custody of any party restrained may be changed from one person to another by order of the court or judge.

Sunday. SEC. 735. Any writ or process authorized by this chapter [article] may be issued and served, in cases of emergency, on Sunday.

Process, by whom issued, &c. SEC. 736. All writs and other process, authorized by the provisions of this chapter [article] shall be issued by the clerk of the court, and, except summonses, sealed with the seal of such court; and shall be served and returned forthwith unless the court or judge shall specify a particular time for any such return. And no writ or other process shall be disregarded for any defect therein, if enough is shown to notify the officer or person of the purport of the process. Amendments may be allowed, and temporary commitments, when necessary.

In whose favor writs granted. SEC. 737. Writs of *habeas corpus* shall be granted in favor of parents, guardians, masters and husbands; and to enforce the rights, and for the protection of infants and insane persons; and the proceeding shall in all such cases, conform to the provisions of this statute.

ARTICLE XLIII.

Mandate and Prohibition.

From what court issued. SEC. 738. Writs of mandate and prohibition may issue from the supreme and circuit courts and courts of common pleas of this State; but such writs shall issue from the supreme court only when necessary for the exercise of its functions and powers.*

To whom. SEC. 739. Writs of mandate may be issued to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law specially enjoins; or, a duty resulting from an office, trust or station.

Upon what issued, how attested, return, &c. SEC. 740. The writ shall be issued upon affidavit and motion, and shall be attested and sealed and made returnable as the court shall direct; and the person, body or tribunal to whom the same shall be directed and delivered, shall make return, and for neglect to do so, shall be proceeded against as for a contempt.

* Courts will not grant a *mandamus* when the party seeking it has a different legal remedy.—*Marshal* vs. *The State ex rel. Cook*, 1 Carter's Ind. Rep. 72.

When a commission to a public officer has been made out, signed and sealed, and is withheld from the person entitled to it, a writ of *mandamus* either to deliver the commission, or a copy of it from the record, is the appropriate legal remedy.—1 Cranch, 137.

A *mandamus* gives no right, not even a right of possession, but puts a man in possession to enable him to assert his right, which, in some cases, he could not do without it; and his possession may afterwards be disputed by every man who has a right.—3 Burr. 1421.

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SEC. 741. The first writ shall be in the alternative or peremptory, as the court shall direct.

Proceedings. SEC. 742. Whenever a return shall be made to any such writ, issues of law and fact may be joined, and like proceedings shall be had for the trial of issues and rendering judgment as in civil actions.

Damages. SEC. 743. In case a verdict shall be found for the plaintiff where the writ is in the alternative, or if judgmeut be given for him, he shall recover damages as in an action for a false return, against the party making the return, and a peremptory writ shall be granted without delay.

Power of court. SEC. 744. The court shall have the same power to enlarge the time of making a return, and pleading to such writ, and for filing any subsequent pleadings, and to continue such cause as in civil actions.

SEC. 745. Obedience to such writs may be enforced by attachment and fine, or imprisonment, or both.

Writ of prohibition. SEC. 746. The writ of prohibition shall command the court and party to whom it shall be directed to refrain from any further proceedings in the matter therein specified, until the return of the writ and the further order of the court thereon; and upon the return, to show cause why they shall not be absolutely restrained from any further proceedings in the matter.

Judgment. SEC. 747. The court shall render judgment, either that a prohibition absolute, restraining the court and party from proceeding in the matter, do issue; or authorizing the court and party to proceed in the matter in question.

SEC. 748. Costs shall be awarded in these proceedings as in civil actions.

ARTICLE XLIV.

Informations.

In what cases filed. SEC. 749. An information may be filed against any person or corporation in the following cases:

First. When any person shall usurp, intrude into, or unlawfully hold or exercise any public office, or any franchise within this State, or any office in any corporation created by the authority of this State.

Second. Whenever any public officer shall have done or suffered any act which, by the provisions of law shall work a forfeiture of his office.

Third. Where any association or number of persons shall act within this State as a corporation, without being legally incorporated.

Fourth. Or where any corporation do or omit acts which amount to a surrender or a forfeiture of their rights and

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privileges as a corporation, or when they exercise powers not conferred by law.*

By whom filed.

SEC. 750. The information may be filed by the prosecuting attorney in the circuit court of the proper county upon his own relation, whenever he shall deem it his duty to do so, or shall be directed by the court or other competent authority; or by any other person on his own relation, whenever he claims an interest in the office, franchise or corporation, which is the subject of the information.

Of what to consist.

SEC. 751. The information shall consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court.

For usurping an office.

SEC. 752. Whenever an information shall be filed against a person for usurping an office, by the prosecuting attorney, he shall also set forth therein the name of the person rightfully entitled to the office, with an averment of his right thereto; and when filed by any other person, he shall show his interest in the matter, and he may claim the damages he has sustained.

Summons.

SEC. 753. Whenever an information is filed, a summons shall issue thereon, which shall be served and returned as in other actions. The defendant shall appear and answer, or suffer default, and subsequent proceedings be had as in other cases.

Judgment in contest for office.

SEC. 754. In every case contesting the right to an office, judgment shall be rendered upon the rights of the parties, and for the damages the relator may show himself entitled to, if any, to the time of the judgment.

Judgment in favor of relator.

SEC. 755. If judgment be rendered in favor of the relator, he shall proceed to exercise the functions of the office after he has been qualified as required by law; and the court shall order the defendant to deliver over all the books and papers in his custody or within his power, belonging to the office from which he shall have been ousted.

Attachment.

SEC. 756. If the defendant shall refuse or neglect to deliver over the books and papers, pursuant to the order, the court or judge thereof shall enforce the order by attachment and imprisonment.

Damages.

SEC. 757. When the judgment is rendered in favor of the plaintiff, he may, if he has not claimed his damages in the information, have his action for the damages at any time within one year after the judgment.

In case of several claimants.

SEC. 758. When several persons claim to be entitled to the same office or franchise, one information may be filed against any or all such persons, in order to try their respective rights to the office or franchise.

Judgment.

SEC. 759. Whenever any defendant shall be found guilty of any usurpation of, or intrusion into, or unlawfully exer-

* For a form of an information, see *Eaton* vs. *The State*, 7 Blackf. 65.

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cising any office, or any franchise within this State, or any office in any corporation created by the authority of this State, or when any public officer, thus charged, shall be found guilty of having done or suffered any act which, by the provisions of law, shall work a forfeiture of his office; or when any association or number of persons shall be found guilty of having acted as a corporation, without having been legally incorporated, the court shall give judgment of ouster against the defendant, and exclude him from the office, franchise or corporate rights; and in cases of corporations, that the same shall be dissolved, and the court shall adjudge costs in favor of the plaintiff.

Judgment against a corporation.

SEC. 760. If judgment be rendered against any corporation, or against any persons claiming to be a corporation, the court may cause the costs to be collected by execution against the persons claiming to be a corporation, or by attachment against the directors or other officers of the corporation, and shall restrain the corporation, appoint a receiver of its property and effects, take an account, and make a distribution thereof among the creditors; the prosecuting attorney shall immediately institute proceedings for that purpose.

Property escheated to the State.

SEC. 761. Whenever any property shall escheat, or be forfeited to the State for its use, the legal title shall be deemed to be in the State from the time of the escheat or forfeiture; and an information may be filed by the prosecuting attorney in the circuit court for the recovery of the property, alleging the ground on which the recovery is claimed; and like proceedings and judgment shall be had, as in a civil action for the recovery of property.

Costs.

SEC. 762. When an information is filed by the prosecuting attorney, he shall not be liable for costs; but when it is filed upon the relation of a private person, he shall be liable for costs, unless the same are adjudged against the defendant.

To annul letters patent, &c.

SEC. 763. An information may be prosecuted for the purpose of annulling or vacating any letters patent, certificate or deed granted by the proper authorities of this State, when there is reason to beleive that the same were obtained by fraud or through mistake or ignorance of a material fact, or when the patentee or those claiming under him, have done or omitted an act in violation of the terms on which the letters, deed or certificates were granted, or have by any other means forfeited the interest acquired under the same.

By whom filed.

SEC. 764. In such cases the information may be filed by the prosecuting attorney, upon his relation, or by any private person upon his relation, showing his interest in the subject-matter, and the subsequent proceeding, judgment of the court, and awarding of costs shall conform to the above provisions, and such letters patent, deed or certificate, shall be annulled or sustained according to the right of the case.

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ATTORNEYS, AND MISCELLANEOUS PROVISIONS.

ARTICLE XLV.

Attorneys.

Who may prosecute a civil action.

SEC. 765. A civil action may be prosecuted or defended by a party in person or by attorney, except that a corporation appears by attorney in all cases.

Who may practice law.

SEC. 766. Every person of good moral character, being a voter, on application shall be admitted to practice law in all the courts of justice. Moral character maybe proved by any evidence satisfactory to the court.

Certificate of admission.

SEC. 767. Whenever any person has been admitted to practice law in a court of record in any county, he shall be entitled to receive from the clerk a certificate of admission, which shall authorize him to practice law in all the courts of this State; but any court may, at any time, inquire into and determine for itself the moral character of any person practicing or offering to practice law in such court.

Non-resident attorney.

SEC. 768. Any court may permit an attorney who is not a resident of this State to practice law therein, during any term of such court, upon his taking an oath for the faithful discharge of his duties.

Oath.

SEC. 769. Every person, before proceeding to discharge the duties of an attorney, shall take an oath to support the Constitution of the United States, and of this State, and that he will faithfully and honestly discharge the duties of an attorney at law, which oath shall be entered in the order book of the court.

List of attys.

SEC. 770. At each term of the court, the clerk shall furnish the court with a list of the names of all the attorneys having business in such court.

Duty of an attorney.

SEC. 771. It shall be the duty of an attorney,

First. To support the Constitution and laws of the United States, and of this State.

Second. To maintain the respect that is due to the courts of justice and judicial officers.

Third. To counsel or maintain such actions, proceedings or defences, only, as appear to him legal and just; but this

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section shall not be construed to prevent the defense of a person charged with a crime, in any case.

Fourth. To employ, for the purpose of maintaining the causes confided to him, such means, only, as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law.

Fifth. To maintain inviolate the confidence, and at every peril to himself, to preserve the secrets of his client.

Sixth. To abstain from all offensive personality, and to advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he is charged.

Seventh. Not to encourage either the commencement or the continuance of an action or proceeding from any motive of passion or interest.

Eighth. Never to reject, from any consideration personal to himself, the cause of the defenceless or oppressed.

Authority of an attorney.

SEC. 772. An attorney has authority, until discharged or superseded by another,

First. To bind his client in an action or special proceeding, by his agreement, filed with the clerk, or entered upon the minutes of the court, and not otherwise.

Second. To receive money claimed by his client in an action or special proceeding, during the pendency thereof or afterwards; and upon the payment thereof, and not otherwise, to discharge the claim, or acknowledge satisfaction of the judgment.*

When judgment may be rendered by agreement of atty.

SEC. 773. No judgment shall be rendered against any party upon the agreement of an attorney, nor any judgment by default, where the party has not been notified, or personally entered his appearance, unless the written authority of the party be first produced, and its execution proved to the satisfaction of the court.

Court may require attorney to produce authority.

SEC. 774. The court or judge may, on motion of either party and on showing reasonable ground therefor, or without such motion, require an attorney to produce and prove the authority under which he appears; and until he does so may stay all proceedings by him on behalf of the party for whom he assumes to appear.

* An attorney has no authority to compromise with a debtor or bind his principal by any arrangement for the satisfaction of the debt, short of an actual collection of the money.—*Wakeman* vs. *Jones*, 1 Carter's Ind. Rep. 517.

Three joint and several sealed notes were placed in the hands of an attorney for collection, without any special instructions. The notes were against A. and B. The attorney took an unsealed note to his client from B., for the whole debt, and gave up to B. the sealed notes to be cancelled, and they were accordingly cancelled. Subsequently, B., at the attorney's request, confessed judgment in favor of the payee on the unsealed note, and afterwards died insolvent, the judgment not being satisfied. Held, that a suit by the payee against A., would lie on the sealed notes. *Miller* vs. *Edmonson*, 8 Blackf. 291.

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Attorneys—denial of authority—suspension—motion against.

When the authority of an attorney is denied.

SEC. 775. If it be alleged by a party for whom an attorney appears, that he does so without authority, the court may at any stage of the proceedings, relieve such party from the consequences of the attorney's act. It may, also, summarily upon motion, compel the attorney to repair the injury consequent upon his assumption of authority.

When guilty of collusion.

SEC. 776. An attorney who is guilty of deceit or collusion, or consents thereto, with intent to deceive a court or judge, or a party to an action or judicial proceeding, is punishable for a misdemeanor, and shall also forfeit to the party injured, treble damages, recoverable in a civil action.

Causes for suspending an attorney.

SEC. 777. Any court of record may suspend an attorney from practicing therein for any of the following causes:

First. When he has been convicted of a felony, or of a misdemeanor, involving moral turpitude, in either of which cases the record of conviction is conclusive evidence.

Second. When he is guilty of a wilful disobedience or violation of the order of court, requiring him to do or forbear an act connected with, or in course of his profession.

Third. For a wilful violation of any of the duties of an attorney, as hereinbefore prescribed. *

Motion against an atty. for not paying over.

SEC. 778. When an attorney, on request, refuses to deliver over money or papers to a person from whom, or for whom he has received them, in the course of his professional employment, whether in an action or not, he may be required, after reasonable notice, on motion of any party aggrieved, by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by the order

* A. being indicted for an assault and battery, and bound by recognizance to answer the charge, was advised by his attorney that if he, A., could not procure a continuance of the cause on affidavit, "he then could escape, and forfeit his recognizance, which would work a continuance of the cause until the next term, at a trifling cost." Held, that the attorney was not, for giving this advise, guilty of a contempt of court.—*Ingle* vs. *The State*, 8 Blackf. 574.

When an attorney is consulted on business within the scope of his profession, the communications between him and his client are strictly confidential; and the attorney should neither be required nor permitted, by any judicial tribunal, to divulge them against his client, if the latter object to the evidence.—*Jenkinson* vs. *The State*, 5 Blackf. 465.

The relation of principal and agent, attorney and client, &c., equally implies a confidence, and, in all contracts between them to which the confidence extends, requires of the party in whom the trust is reposed, the highest degree of good faith. It rests on him to prove that the contract is, in every respect, equal, fair and equitable. If he fail in this, it is a case of constructive fraud, and avoids the contract. And this rule in equity is not confined to the confidence incident to these formal relations, but it is applicable to all cases where confidence on the one hand and influence on the other exist, from whatever cause they may spring. —*McCormick* vs. *Malin et al.*, 5 Blackf. 509.

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of any court of record, to do so, within a specified time, or show cause why he should not be punished for contempt.*

Penalty.

SEC. 779. In cases contemplated in the last preceding section, on such motion, or in an action brought by the party aggrieved, the court may suspend the attorney from practice in any of the courts of this State, for any length of time, in its discretion; judgment may also be rendered for the amount of money withheld, deducting fees, if any are due, and costs paid by the attorney, with ten per cent. damages, which may be enforced by execution, without the benefit of stay or appraisement laws, and returnable within thirty days. The court may also render any judgment, and make any order respecting papers or property withheld, that may be necessary to enforce the right of the party aggrieved, subject to any liens the attorney may have thereon for fees.

Complaint, how made.

SEC. 780. The proceedings to remove or suspend an attorney may be commenced by the direction of the court, or on motion of an individual. In the former case, the court must direct some attorney to draw up and prosecute the accusation; in the latter case it may be drawn up by any person, and sworn to by the person making it. Such accusation may be filed in any court in which the attorney practices, and after five days' notice of the filing, the attorney shall be bound to appear and plead to the same, or suffer judgment by default. If he appear, pleadings may be filed and trial had as in other cases.

Judgt. of acquittal, final.

SEC. 781. In proceedings to remove or suspend an attorney, a judgment of acquittal shall be final and without appeal. But from a judgment of suspension or removal, or any other judgment against an attorney, the accused may appeal to the supreme court, in the same manner as from a judgment in a civil action. A motion may be made at any time to reinstate an attorney who has been suspended or removed.

ARTICLE XLVI.

Causes of action that survive.

What actions do, and what do not, die with the the person.

SEC. 782. A cause of action arising out of an injury to the person, dies with the person of either party, except in cases

* When charges were filed against an attorney at law, under the statute of 1838, for failing to pay over money, &c., it was held that the only judgment that could be rendered against the defendant, was that of suspending him from the practice of the law.—*Dawson* vs. *Compton*, 7 Blackf. 421.

The latter clause of the statute, which provides that an attorney who shall fail to pay over money collected, &c., should pay 10 per cent., &c., was held to apply to suits brought for the recovery of the money.—*Ibid.*

In said proceeding by filing charges, &c., it was held that the defendant might show the circumstances under which the money had been retained, in mitigation, if not in justification, of his conduct.—*Ibid.*

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in which an action is given for an injury causing the death of any person, and actions for seduction and false imprisonment.

Other actions survive.

SEC. 783. All other causes of action survive, and may be brought by or against the representatives of the deceased party, except actions for promises to marry.

Who may maintain action, and when commenced.

SEC. 784. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed five thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

ARTICLE XLVII.

Miscellaneous Provisions.

Pleadings sworn to.

SEC. 785. Pleadings sworn to by either party in any case shall not on the trial be deemed proof of the facts alleged therein, nor require other or greater proof on the part of the adverse [party] than those not sworn to.

New parties.

SEC. 786. When a new party is introduced into an action as a representative or successor of a former party, such new party is entitled to the same notice, to be given in the same manner as required for defendants in the commencement of an action.

Time, how computed.

SEC. 787. The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

What deemed slander.

SEC. 788. Every charge of incest, fornication, adultery, or whoredom, falsly made by any person against a female; also, words falsely spoken of any person, charging such person with incest, or the infamous crime against nature, either with mankind or the brute creation, shall be actionable in the same manner as in the case of slanderous words charging a crime, the commission of which would subject the offender to death, or other degrading penalties.*

*Slander by a *feme sole* against husband and wife, for the following words spoken by the wife: "Doctor Eddy made an appointment with Elizabeth Cunningham, (meaning the plaintiff,) scaled the walls, and went to bed to her, (meaning the plaintiff,) at Mrs. Reperton's house; (thereby meaning that the plaintiff had committed fornication.") Held, that the words were actionable under the statute.—*Shields et ux.* vs. *Cunningham*, 1 Blackf. 86.

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Slander--decisions concerning.

Action of slander brought by A. and Mary A., his wife, for the following words charged to have been spoken of the wife, and of and concerning her character for chastity: "Have you heard that B. was hunting up a story in circulation about C. and Mary A., (meaning, &c.) being seen in the woods together? I saw them in the woods together myself, etc. If you had seen what I have you would feel satisfied in your mind. God knows and I know that they are intimate; (thereby meaning that said Mary had been guilty of adultery with C.) Held, that the words were not actionable unless they were spoken in a conversation about the wife's character for chastity.—*Ricket* vs. *Stanly*, 6 Blackf. 169.

Words spoken in another State, if actionable at common law, will support an action here. *Aliter*, if not actionable at common law, nor shown to be so by statute in the State where spoken, though actionable here by statute.—*Stout* vs. *Wood*, 1 Blackf. 71.

In an action of slander, the charge complained of being the commission of an offense against the State, the same degree of evidence is necessary to sustain the plea of justification that would be required to convict the plaintiff on a criminal prosecution for that offense.—*Landis* vs. *Shanklin*, 1 Carter's Ind. Rep. 92.

Same point decided in *Gants* vs. *Vinard*, 1 Carter's Ind. Rep. 476.

Under the general issue, and a plea of justification, in an action for slander, if the evidence adduced create in the minds of the jury, strong suspicions of the guilt of the plaintiff, the jury may regard such evidence in mitigation of damages.—*Landis* vs. *Shanklin*, 1 Carter's Ind. Rep. 92.

Evidence of the repetition of slander is admissible to prove the alleged malice, but not to aggravate the damages.—*Burson* vs. *Edwards*, 1 Carter's Ind. Rep. 164.

On the trial in an action for slander, the court instructed the jury, "that if the defendant had failed to sustain his pleas of justification by proof, they might consider them as evidence of malice and in aggravation of damages." Held, that the instruction is erroneous, as it does not follow that the justification, if not fully proved, should aggravate the damages.—*Shank* vs. *Case*, 1 Carter's Ind. Rep. 170.

The publisher and proprietor of a newspaper is liable for a libel published in his paper, and circulated to his subscribers, though it was published without his knowledge or consent, when he was absent, by agent, who had received instructions from the publisher to refuse its publication.—*Dunn* vs. *Hall*, 1 Carter's Ind. Rep. 344.

In an action of slander the plea of justification is inadmissible to prove the repetition of the charge in order to increase the damages.—*Murphy* vs. *Stout*, 1 Carter's Ind. Rep. 372.

An action for slander. The declaration alleged, by way of inducement, that the plaintiff was an unmarried woman, and sister of Jesse Millison, and then alleged that the defendant, in the presence, &c. spoke, &c. the following false, &c. words, namely, "all the bravery you ever showed was in sleeping with your sisters," (meaning the plaintiff,) thereby meaning that the said Jesse had been guilty, &c. Held, that the extrinsic facts were not sufficiently alleged, and therefore the count contained no cause of action.—*Millison* vs. *Sutton*, 1 Carter's Ind. Rep. 508.

In an action for slander and malicious prosecution, the accusation complained of being larceny, the plea of justification must be proved beyond a reasonable doubt.—*Shoulty* vs. *Miller*, 1 Carter's Ind. Rep. 544.

A plea of justification in an action for slander, though no evidence be given under it, cannot be considered in aggravation of damages; neither can the repetition of slander by the defendant after the commencement of the suit, be considered in determining the question of damages.—*Ibid.*

Evidence adduced, under a plea of justification in an action for slander and malicious prosecution, which shows that the defendant had reason to believe, from the plaintiff's conduct, that the charges were true, may be considered in mitigation of damages, though it does not establish the plea.—*Ibid.*

Living in open and notorious fornication or adultery is an indictable offense; but the mere act of fornication or adultery is not indictable.—*Lumpkins* vs. *Justice et ux.*, 1 Carter's Ind. Rep. 557.

When the mere charge of fornication or adultery is made, the words are not actionable, by statute.—*Ibid.* The getting of an unmarried woman with child is

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Slander—decisions concerning.

not an indictable offense; and the charge of such offense is not actionable, unless made so by statute.—*Ibid.*

In slander, evidence that the defendant, after having spoken the words laid, had repeated them at various times, is inadmissible in aggravation of damages.—*Forbes* vs. *Myers*, 8 Blackf. 74.

Words amounting to a charge that the plaintiff had committed a penitentiary offense, but that he was insane when he committed it, are not actionable.—*Abrams* vs. *Smith*, 8 Blackf. 95.

The defendant may demur to a part of the words laid in a count in slander.—*Ibid.*

In slander, until some of the actionable words laid have been proved, evidence of the *quo animo* of the defendant is inadmissible.—*Ibid.*

If in such action, the defendant give evidence tending to show that the words were not spoken maliciously, the question of malice is for the jury.—*Ibid.*

The defendant may prove in slander, under the general issue, that the words were spoken on a justifiable occasion without malice.—*Ibid.*

An action of slander may be brought against a single defendant in any county in which he may be found.—*Teagle* vs. *Deboy*, 8 Blackf. 134.

The plaintiff in slander does not, by proving a repetition of the words after the commencement of the suit, give the defendant a right to prove them to be true, under the general issue, in mitigation of damages.—*Ibid.*

Evidence tending to prove the truth of the words in slander is inadmissible under the general issue.—*Ibid.*

Under the general issue in slander, the evidence is usually closed with the plaintiff's rebutting testimony; and if the defendant would go further, he must show some special cause.—*Ibid.*

In such suit, which was for charging the plaintiff with stealing a horse, the verdict was for 500 dollars. A new trial, moved for on the ground that the damages were excessive, was refused. Held, that there was no error in the refusal.—*Ibid.*

Slander. It appeared that other actionable words besides those laid in the declaration, had, though objected to, been given in evidence. Held, that the evidence of such other words was admissible to show malice; and that it would be presumed, the contrary not appearing, that the evidence had been admitted for that purpose, or that the jury had been properly instructed as to the effect of the evidence.—*Roberts* vs. *Ward*, 8 Blackf. 333.

The *innuendoes* in a declaration in slander should be warranted by the previous allegations.—*Stucker* vs. *Davis*, 8 Blackf. 414.

It is sufficient in slander that so many of the words of any set charged be proved as constitute, of themselves, the slanderous accusation.—*Iseley* vs. *Lovejoy*, 8 Blackf. 462.

Quære as to the amount of damages recoverable in slander, if the defendant spoke the words when intoxicated and in the heat of passion.—*Ibid.*

Slander for charging the plaintiff with perjury. Plea, that the charge was true. Held, that to support the plea, the truth of the charge must be proved, beyond a reasonable doubt, by such evidence as would justify a conviction on an indictment for the offense.—*Lanter* vs. *McEwen*, 8 Blackf. 495.

Evidence, in slander, that the defendant had, after speaking the words laid, repeated them at different times, is inadmissible for the plaintiff in aggravation of damages.—*Ibid.*

But such evidence, where the defendant's intention in speaking the words is at all equivocal, is admissible to show malice.—*Ibid.*

If to a plea of the statute of limitations in slander, the plaintiff reply that the words were spoken within the prescribed time, he must prove the speaking of some of the actionable words within that time.—*Huston* vs. *McPherson*, 8 Blackf. 562.

Slander. Pleas, not guilty and the statute of limitations. No replication to the special plea. Verdict and judgment for the plaintiff. Held, that, the special plea being unanswered, the trial was not legal.—*Ibid.*

Action of slander for charging the plaintiff with larceny. Plea, not guilty, and a justification alleging the words to be true. On the trial the court instructed the jury as follows: "The testimony to sustain that plea (the justification) should be as certain and conclusive as would be required to justify a conviction for larceny, if the plaintiff were indicted for the offense—such as leave no rational doubt in the minds of the jury of the truth of the charge." The defendant objected to this

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Instruction. Verdict and judgment for the plaintiff. Judgment affirmed.—*Wonderley* vs. *Nokes*, 8 Blackf. 589.

Slander for calling the plaintiff a whore. The words were laid to have been spoken in 1842. Plea, that the plaintiff while sole and unmarried, on the 1st of January, 1834, had carnal connection with one H. Replication, that the plaintiff, before, and at the time mentioned in the plea, was betrothed to the said H.; that afterwards, on the 6th of June, 1834, she was lawfully married to him; that she lived with him a virtuous life until the 1st of August, 1836, when he died; and that she had ever since continued to live in innocent and virtuous widowhood. Held, on general demurrer, that the replication was insufficient.—*Alcorn* vs. *Hooker*, 7 Blackf. 58.

When the plaintiff, in an action of slander, proves the speaking of the actionable words laid in the declaration, the law implies that the words are false, and that they were spoken maliciously, unless there is evidence sufficient to satisfy the jury to the contrary.—*Byrket* vs. *Monohon*, 7 Blackf. 83.

If in slander for charging the plaintiff with perjury, the defendant justify on the ground that the words are true, the plaintiff may prove, on the trial, his general good character for truth.—*Ibid.*

To prove, in support of such justification, the falsity of the plaintiff's statement, two witnesses, or one witness and strong corroborating circumstances, are necessary; but to prove the other allegations in the plea, one witness is sufficient.—*Ibid.*

On the trial in such case, the jury were instructed that if the defendant had failed to prove the plea to be true, the filing of the plea was a great aggravation of the slander, and the jury should take that circumstance into consideration in assessing the damages. Held, (without determining what would be the effect of the plea were there no evidence introduced in its support,) that the instruction must in this case be erroneous, as it did not necessarily follow, as the instruction supposed, that the justification, if not fully proved, should aggravate the damages.—*Ibid.*

Where the plea of justification in such case is not entirely proved, but the evidence given under it shows that the defendant had reason to believe, from the plaintiff's conduct, that the charge was true, such evidence may be considered by the jury in mitigation of damages.—*Ibid.*

A declaration in slander alleged the words to have been spoken in a discourse with A. B., in the presence and hearing of others. Held, that it was not necessary to prove that the words were addressed to A. B.—*Richardson et ux.* vs. *Hopkins*, 7 Blackf. 116.

The words "You hooked my geese," are not actionable in themselves.—*Hays et ux.* vs. *Mitchell et ux.*, 7 Blackf. 117.

Words not actionable in themselves may express a criminal charge, by reason of their allusion to some extrinsic fact, or of their being used and understood in a different sense from their natural meaning, and thus become actionable.—*Ibid.*

An innuendo cannot change the ordinary meaning of language.—*Ibid.*

In slander the jury cannot, in assessing the damages, take into consideration evidence of the defendant's having spoken, since the commencement of the suit, the same words as those laid in the declaration.—*Schoonover* vs. *Rowe*, 7 Blackf. 202.

Words charging a woman who was never married with having had a child and buried it in the garden, amount to a charge of fornication, and are therefore actionable by statute.—*Worth* vs. *Butler*, 7 Blackf. 251.

In an action of slander brought in this State for such words, it will be presumed, until the contrary be proved, that the words were spoken in this State.—*Ibid.*

When the words charged are *prima facie* actionable, no averment of extrinsic facts is necessary.—*Ibid.*

Slander for several sets of words (with a colloquium, &c.); some of which charged the plaintiff with having sued the defendant on a note he had never signed, &c.; the others, with having signed the defendant's name to said note without his permission, &c. Held, that the suit would lie for the latter words, but not for the former.—*Creelman* vs. *Marks*, 7 Blackf. 281.

To said words charging the plaintiff with signing the defendant's name to the note without his permission, a plea that the plaintiff did sign the defendant's name to said note without his permission, was held to be good.—*Ibid.*

It is not sufficient in such action, that the words proved have the same meaning with those laid. All the words laid need not be proved, but so many of them must be proved as will support the action.—*Ibid.*

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Slander—decisions concerning.

The words "He" (meaning the plaintiff) "took a false oath," are not in themselves actionable.—*Roella* vs *Follow*, 7 Blackf. 377.

In a suit for such words, there must not only be in the declaration the requisite inducement and colloquium, but there must also be an innuendo explaining the defendant's meaning by reference to the previous matter.—*Ibid.*

But if the words laid do, of themselves, import a crime, there is no occasion for an innuendo explaining their meaning.—*Ibid.*

If a justice of the peace issue a state-warrant on an insufficient affidavit, and the party accused, on being arrested, proceed to trial before the justice without objection, the insufficiency of the affidavit will not render the proceedings *coram non judice.* And to charge a witness with swearing false on such trial is actionable.—*Henry* vs. *Hamilton*, 7 Blackf. 506.

Slander for charging the plaintiff with perjury. Plea, the statute of limitations and a justification that the words were true. *Semble*, that the general bad character of the plaintiff in such case may, even under a justification, be proved with a view to lessen the damages.—*Sanders* vs. *Johnson*, 6 Blackf. 50.

In such case the existence of prior reports charging the plaintiff with the crime imputed to him by the defendant, without any offer to explain their extent, or effect upon the character of the plaintiff, is not, under a plea of justification, legal evidence in mitigation of damages.—*Ibid.*

Held, also, that there may perhaps be cases in which the evidence—showing not the truth of the justification pleaded, but that the defendant had reason, from the glaring misconduct of the plaintiff, to believe the charge and plea of justification to be true—may be considered by the jury in mitigation of the damages; but that the record before the court did not show such a case.—*Ibid.*

If the words in slander be laid to have been spoken to the plaintiff, it is a variance if they were spoken to a third person concerning him.—*Cubertson* vs. *Stanley*, 6 Blackf. 67.

Action of slander for words charging the plaintiff with stealing the defendant's chairs, &c. Plea, the statute of limitations. The plaintiff proved the speaking of the words within the prescribed time; but, according to one of his witnesses, the words laid in the declaration were accompanied with explanations which showed the charge made to amount only to a breach of trust. Held, that evidence by the defendant that the plaintiff had committed such breach of trust, was inadmissible on the ground of irrelevancy.—*Burke* vs. *Miller*, 6 Blackf. 155.

If the plaintiff in slander prove the speaking of words not laid in the declaration tending to show malice, the defendant may, under the general issue, prove those words to be true.—*Ibid.*

The defendant in such action may, under the general issue, prove the plaintiff's general character to be bad, in mitigation of damages; but he cannot, either for that purpose or to defeat the suit, prove, under such plea, the existence of particular facts tending to show the truth of the words laid in the declaration.—*Ibid.*

As to words spoken in a trial, see *Nelson* vs. *Robe*, 6 Blackf. 204.

A declaration in slander charged the defendant with speaking of the plaintiff certain actionable words in the French language, and gave a translation of the words in English. Held, that, by a demurrer to the declaration, the correctness of the translation was admitted.—*Hickley* vs. *Grosjean et ux.*, 6 Blackf. 351.

In determining on such demurrer, whether the words laid are actionable, the court can only be expected to examine the English words.—*Ibid.*

The plaintiff in such case must aver in the declaration, what he understands to be the meaning in English, of the French words charged; and he must prove on the trial, under the general issue, not only the speaking of some of the French words laid which are actionable, but he must also prove that the translation of those words is correct.—*Ibid.*

A *feme sole* brought an action of slander for words charging her with fornication and adultery. Pleas, not guilty, and that the words were true. Held, that the defendant might prove, in mitigation of damages, the plaintiff's general character as to chastity, to be bad. Held, also, that evidence in support of the plaintiff's character, was inadmissible, until there had been an attempt, by evidence, to impeach it.—*McCube et ux.* vs. *Platter*, 6 Blackf. 405.

Words charging a person with having forged a deposition are actionable.—*Atkinson* vs. *Reding*, 5 Blackf. 39.

Words charging a justice of the peace with corrupt conduct, in trying a cause over which he has no jurisdiction, are not actionable.—*Oram* vs. *Franklin*, 5 Blackf. 42.

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Slander—decisions concerning.

The following words spoken of a postmaster in reference to his official character,—"He would rob the mail for 100 dollars; yes, he would rob the mail for 5 dollars"—are actionable.—*Craig* vs. *Brown*, 5 Blackf. 44.

If, in an action of slander, the words be proved to have been spoken affirmatively as they are laid, the charge is supported, though it appear that they were spoken in answer to a question put by a third person, unless it also appear that the plaintiff caused the question to be put in order to procure a cause of action.—*Jones* vs. *Chapman*, 5 Blackf. 88.

If the words were spoken maliciously, or if the defendant did not believe them to be true, the giving the name of the author did not lessen the offense.—*Ibid.*

Words charging the plaintiff with having robbed the U. States' mail are actionable.—*Ibid.*

Words charging a person with having been guilty of a malicious trespass are actionable.—*Wilcox* vs. *Edwards*, 5 Blackf. 183.

To charge one with being a thieving person, or to say of him that he stole and ran away, is actionable.—*Alley* vs. *Neely*, 5 Blackf. 200.

In actions of slander, the jury are to determine the amount of damages from the facts proved, and not from the opinions of witnesses.—*Ibid.*

A count in slander charged that the defendant spoke of the plaintiff the following words: "*D—n his little soul, I believe he is bouging about making his meat out of the woods, and selling his hogs at home: I can prove he had a hog hanging up at his house this fall with a crop off one year; I have lost my hogs, and I believe he and his nearest neighbors got them; he marked my hogs; he is in the practice of marking hogs that run in the woods;* he has been taken up for hog-stealing, and one of his brothers cried like h—ll to get him out of the scrape; he is a hog-thief, and gets his living by killing other people's hogs; he is a thief." General demurrer to the words in italics. Held, that the demurrer was not objectionable for being to only a part of the words laid. Held, also, that the words demurred to were not actionable.—*Wyant* vs. *Smith*, 5 Blackf. 293.

A key, though in the lock of a door in a house, is the subject of larceny; and words charging a person with stealing it are actionable.—*Hoskins* vs. *Tarrence*, 5 Blackf. 417.

Although the words laid in a declaration in slander do not contain a directly affirmative charge that the plaintiff had committed forgery, yet if they were calculated to induce the hearers to *suspect* that the plaintiff had committed it, they are actionable.—*Drummond* vs. *Leslie*, 5 Blackf. 452.

In an action for slanderous words charging a crime, it must appear that the criminal act was imputed to the plaintiff; and if it be uncertain of whom the words were spoken, the suit is not maintainable.—*Harvey* vs. *Coffin*, 5 Blackf. 566.

A defendant in an action of slander may prove, under the general issue, the general bad character of the plaintiff in mitigation of damages, and therefore, the defendant's affidavit for a continuance in such case, on account of the absence of witnesses by whom that fact could be proved, cannot be objected to on the ground that the witnesses are not material.—*Woods* vs. *Anderson et ux.* 5 Blackf. 598.

To a plea of the statute of limitations in slander, the plaintiff replied that the suit was commenced within one year next after the speaking of the words. Issue on the replication. Held, that this issue was not immaterial.—*Wilcox* vs. *Edwards*, 5 Blackf. 183.

Slander. Plea, the statute of limitations. Held, that for the purpose of showing malice in the speaking of the words charged, the plaintiff might prove that the defendant had spoken similar words more than a year before the suit was commenced; but that such evidence was not admissible to aggravate the damages.—*Throgmorton* vs. *Davis et ux.*, 4 Blackf. 174.

On the trial of an action of slander, some of the actionable words laid in the declaration must be proved, or the plaintiff cannot recover; proof of equivalent words will not do.—*Moore* vs. *Bond et ux.*, 4 Blackf. 458.

An action of slander lies here for words spoken in another State, charging the plaintiff with being guilty of larceny.—*Offutt* vs. *Earlywine*, 4 Blackf. 460.

If in slander for actionable words, the speaking of the words be proved, and they be not explained or justified, the jury may infer that the charge is false and malicious.—*Yeates et ux.* vs. *Reed et ux.*, 4 Blackf. 463.

In such case evidence of actual damage is not necessary to the plaintiff's recovery.—*Ibid.*

In a suit against husband and wife for words spoken by the wife, evidence of

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Slander—decisions concerning.

the husband's exertions to prevent the circulation of the slander, is not admissible in mitigation of damages.—*Ibid.*

Slanderous words spoken affirmatively in answer to a question, should be laid to have been spoken affirmatively; if spoken in the form of a question, they must be laid to have been interrogatively.—*Ibid.*

Under the general issue in slander, the defendant may, either in extenuation or mitigation according to circumstances, show that he was insane when the words were spoken. The insanity, however, must be established, not by reputation, but by direct proof.—*Ibid.*

Words spoken in another State, actionable at common law, are actionable here. —*Linville* vs. *Earlywine*, 4 Blackf. 469.

When the words complained of in slander derive their slanderous import from extrinsic facts, the declaration must aver those facts, and connect them by a *colloquium* with the words laid.—*Ibid.*

In slander, neither equivalent words, nor words which derive their identity of meaning with those laid in the declaration from extraneous matter not averred, are sufficient to support the action.—*Ibid.*

Two persons were disputing about their partnership accounts as merchants, when one charged the other with pilfering out of the store. Slander for these words. Held, that to charge another with pilfering is actionable. Held, also, that it was not error to permit the plaintiff on the trial to ask a witness who heard the charge, what he understood by it, nor to refuse the defendant leave to prove that the plaintiff attended alone in the store. Held, also, that the judgment in this case against the defendant, on his demurrer to the evidence, was not erroneous.—*Beckett* vs. *Sterrett*, 4 Blackf. 499.

A count in slander stated that the defendant had spoken of and concerning the plaintiff these false and slanderous words: "John Butler, (meaning the plaintiff,) swore a lie in the case of Noah Anderson against myself (meaning him, the said defendant, and referring to a suit previously determined in the Pike circuit court) and I (the said defendant meaning) can prove it. Held, that this was not a sufficient statement that the defendant had charged the plaintiff with the perjury.—*Cummins* vs. *Butler*, 3 Blackf. 190.

To an action of slander for charging the plaintiff with stealing hogs, it is not a good plea in bar, that the plaintiff had stolen *one* hog.—*Swann* vs. *Rary*, 3 Blackf. 298.

The defendant cannot prove in such an action that it was generally known in the neighborhood, that there had been a quarrel between the parties.—*Ibid.*

To an action of slander for charging the plaintiff with having forged a certain instrument of writing, the truth was pleaded in justification. Held, that such a plea cannot be objected to, because it avers the forged instrument to be in the plaintiff's possession or destroyed. Held, also, that in a plea with such an averment, the instrument need not be so particularly described, as would be otherwise required.—*Kent* vs. *David*, 3 Blackf. 301.

If one of the counts of the declaration, in such action, be for charging the plaintiff with forging an instrument of writing, a plea to the whole declaration that the defendant *uttered* the forged instrument, &c. is insufficient.—*Ibid.*

Words charging a postmaster with taking money out of a letter put into the office by the defendant, and appropriated to his own use, with keeping and embezzling letters, &c., are actionable.—*Hays* vs. *Allen*, 3 Blackf. 408.

Such slanderous words, assuming that the plaintiff possessed the character in which he was defamed, operate as an admission, and are *prima facie* evidence of the fact.—*Ibid.*

Though the declaration in this case not only stated that the plaintiff was postmaster, appointed and commissioned by the Postmaster General, but also that he had given bond and been sworn into office, it was held that his character of postmaster, if evidence of it could be required, was sufficiently established by proof of his commission, and of his acting in that capacity.—*Ibid.*

As to a charge of arson, see *McNeal* vs. *Woods*, 3 Blackf. 485.

In an action of slander for charging the plaintiff with perjury in a certain trial, a plea that the charge is true, is not supported by proof that the plaintiff had sworn false on the trial, as to an immaterial point.—*McGlemery* vs. *Keller*, 3 Blackf. 488.

Actionable words, as laid in the declaration, spoken after the commencement of the suit, cannot be proved in aggravation of damages.—*Ibid.*

In a prosecution before a justice of the peace for an assault and battery under

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Slander—decisions concerning.

the statute of 1818, the defendant was found guilty and fined three dollars. An action of slander was afterwards brought for words charging the plaintiff with having sworn false on that trial; and the words were objected to as not being actionable, on the ground that the justice had no jurisdiction. Held, that though the statute was deemed unconstitutional so far as it gave the justice authority to inflict a fine exceeding three dollars, yet when, as in this case, the fine inflicted did not exceed that sum, the objection was untenable.---*Clark* vs. *Ellis*, 2 Blackf. 8.

Slander for charging a man with having illicit intercourse with his wife's sister. Held, that the words did not contain a charge of incest, but only of fornication or adultery. Held, also, that as, at the time of speaking the words, neither fornication nor adultery was an indictable offense, the words were not actionable.---*Dukes* vs. *Clark*, 2 Blackf. 20.

A plaintiff in slander, having first proved that the defendant had spoken to third persons the words laid in the declaration, may prove, in support of the declaration, that the defendant had spoken the same words in answer to the plaintiff's interrogatories.---*Gordon* vs. *Spencer*, 2 Blackf. 286.

A declaration in slander against husband and wife, charging that the wife had said that A. and his wife made no bones to say that the plaintiff had stolen their thread, and averring that neither A. nor his wife had ever said so, was held good on demurrer.—*Whittam et ux.* vs. *Young*, 1 Blackf. 299.

The plaintiff, in slander, need not prove all the words laid in the declaration; but he must prove so much of them as is sufficient to support his action.—*Wheeler* vs. *Robb*, 1 Blackf. 330.

Evidence of equivalent words is not sufficient.—*Ibid.*

Proof of the words is not rendered unnecessary by a special plea of justification, if the general issue be also pleaded.—*Ibid.*

Although a defendant obtain a verdict and judgment in an action against him for slanderous words, the plaintiff may sue him again for other words spoken previously to the commencement of the action.—*Henson* vs. *Veatch*; 1 Blackf. 369.

Where the action is for words, charging the plaintiff with having sworn false on the trial of a cause wherein A. was plaintiff and B. defendant; a former judgment for the defendant, in an action for saying that the plaintiff had sworn false on the trial of a cause wherein B. was plaintiff and A. defendant, is no bar.—*Ibid.*

If the defendant in slander, instead of justifying, plead the general issue, he cannot prove the truth of the words either in bar of the action or in mitigation of damages.—*Ibid.*

The defendant may prove in mitigation of damages, under the general issue in slander, that there was a general suspicion of the plaintiff's guilt; but evidence merely of the defendant's suspicions on the subject, is inadmissible.—*Ibid.*

Words spoken here, charging a person with having committed larceny in another State, are actionable.—*Cefret* vs. *Burch*, 1 Blackf. 400.

The charging another with having a loathsome disorder, as the clap, is actionable without proof of special damage; but the declaration alleging the words in the past tense, is bad on demurrer.—*Nichols* vs. *Guy*, 2 Carter's Ind. Rep. 82.

In an action of slander, the charge complained of being perjury, under a plea of justification, the same degree of evidence is required as would convict in a criminal prosecution for that offense; but a failure to sustain that plea, is not to be considered in aggravation of damages.—*Swails* vs. *Butcher*, 2 Carter's Ind. Rep. 84.

The court below instructed the jury "That if the plaintiff and defendant, and one Springer, had set down to gamble in Greensburgh, and while there Springer took out a five dollar bill and proposed to bet one dollar; that after the bill was put down it was missing, and search was made for it; that the parties were searched, but it could not be found; that the parties went out of the house to search for it, and found, near the window, a pocket-book unclasped and the bill in it; that Springer took the bill and handed the pocket-book to the plaintiff, who took it and said 'don't tell this on me, for if you do it will ruin me,' an action of slander lies for speaking the words." Held, that these words, not implicating a charge of larceny, are not actionable *per se*.—*Prichard* vs. *Lloyd*, 2 Carter's Ind. Rep. 154.

Slander. Words charged: "It struck me, when Mr. C. told me so, that that house (meaning plaintiff's) was as bad as any house of ill-fame in the city of New York." Held, that in this case the words "house of ill-fame," meant nothing

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Bail—defective bonds—specific performance.

Taking bail.

SEC. 789. Every court and officer authorized to take any bail or surety, shall have power to examine on oath the person offering to become such bail or surety, concerning his property, and sufficiency as such bail or surety.

Bonds not void for certain defects.

SEC. 790. No official bond entered into by any officer, nor any bond, recognizance or written undertaking taken by any officer in the discharge of the duties of his office, shall be void for want of form or substance, or recital, or condition, nor the principal or surety be discharged; but the principal and surety shall be bound by such bond, recognizance or written undertaking, to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance. In all actions on a defective bond, recognizance or written undertaking, the plaintiff or relator may suggest the defect in his complaint, and recover to the same extent as if such bond, recognizance or written undertaking were perfect in all respects.

Specific performance.

SEC. 791. In any action brought for the recovery of the purchase-money against any person holding a contract for the purchase of lands, the party bound to perform the contract, if not plaintiff, may be made a party, and the court, in the final judgment, may order the interest of the purchaser to be sold, or transferred to the plaintiff upon such terms as may be just; and may also order a specific perform-

more than that the house was one of bad reputation.—*Dodge* vs. *Lacey*, 2 Carter's Ind. Rep. 212.

If the defendant was in the habit of using the words "house of ill-fame" to convey the idea of bawdy house, the declaration by way of inducement, should have alleged that fact.—*Ibid.*

The following written charge was published by E. R.: Charge 4th, Refusing to correct Geofge C. in his statement as a witness before Esq. B., when I believe he, J. C., knew his, George's statement, was not true." Held, that this writing, when shown by proper innuendoes to have been applied by E. R. to the testimony of George C. on the trial of a certain case, was a libel by the writer on George C. —*Coombs* vs. *Rose*, 8 Blackf. 155.

Words spoken or written in the regular course of church discipline to or of members of the church, are, as among the members themselves, privileged communications, and not actionable, unless express malice in the speaker or writer be proved.—*Ibid.*

But an accusation made by a member of a church on such occasion, against a person not a member, is not, as to him, a privileged communication.—*Ibid.*

A publication, to be a libel, must tend to injure the plaintiff's reputation, and expose him to public hatred, contempt or ridicule.—*Armentrout* vs. *Moranda*, 8 Blackf. 426.

If the libel for which a suit is brought be contained in a letter sent by the defendant to the plaintiff, evidence that the letter was in the defendant's handwriting, and that he had read it aloud in the presence of several persons before it was sent, is sufficient to authorize the handing of the letter to the jury.—*M'Coombs* vs. *Tuttle*, 5 Blackf. 431.

The publication of a libel is actionable, though the defendant had the libellous statement from another, and gave the name of the author in the publication.—*Clarkson* vs. *McCarty*, 5 Blackf. 574.

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ance of the contract in favor of the complainant, or the purchaser, in case a sale be ordered. *

* The vendor of real estate, by taking the vendee's promissory notes for the purchase-money, with a third person as security, waives his equitable lien on the land for such money, unless there be an express contract that such lien shall be retained.---*Way* vs. *Patty et al.*, 1 Carter's Ind. Rep. 102.

Such lien cannot be enforced against a subsequent purchaser, though he had notice from the vendor, at the time of purchase, that the notes were unpaid.---*Ibid.*

A sale of either real or personal property, made with the intention of preventing creditors from collecting their demands, or damages about to be recovered of the vendor, if the vendee participate in the fraudulent intent, or have notice of it, is voidable at the suit of such creditors, notwithstanding the vendee may have paid an adequate consideration.---*Wright* vs. *Brandis*, 1 Carter's Ind. Rep. 336.

If the consideration be valuable and adequate, the title of the grantee may be valid, notwithstanding the intention of the grantor to defraud his creditors thereby, if the grantee has no knowledge of such intention.---*Doe* vs. *Horn*, 1 Carter's Ind. Rep. 363.

The title of a purchaser at sheriff's sale relates back to the date of the judgment under which the premises were sold.---*Ibid.*

To maintain a suit on a note for the purchase-money of land, which is payable at the same time that the deed is to be executed, it is not incumbent on the payee to make an absolute tender of the deed; it is necessary but to offer it on the specified day, on condition of the defendant at the same time paying him the note.---*Gorham* vs. *Reeves*, 1 Carter's Ind. Rep. 421.

A. conveyed to B. certain land and took from him a bond for a re-conveyance of the land on A.'s paying 700 dollars. The money was not paid, and B. conveyed the land to C. and D., who sold it to the complainant, and gave him a bond for a deed when the purchase money was paid. Held, that the complainant could have no claim under such bond until he had paid, or offered to pay, the purchase-money, upon receiving a deed at the same time.---*Browning* vs. *Clymer*, 1 Carter's Ind. Rep. 579.

A conveyance of real estate, will, if not recorded in time, be defeated by a subsequent one, if the latter be first recorded, unless the subsequent purchaser had notice of the prior conveyance.---*Orth* vs. *Jennings et al.*, 8 Blackf. 420.

Debt by the assignee against the maker of a promissory note. Plea, that the note was given for the price of two town lots sold by the payee to the defendant, that the time for conveying the lots was passed; and that the payee had not made or offered to make a good deed in fee for the lots to the defendant, as he was bound to do. Replication that the payee had conveyed the lots as he was bound to do by his agreement. Rejoinder that the payee had not conveyed the lots in fee to the defendant, on which issue was joined. Held, that the plaintiff could not recover without proof that both lots had been conveyed according to the contract.---*Way* vs. *Simmons*, 8 Blackf. 559.

If the vendee of land who has contracted to pay the purchase-money at a certain time, and has taken possession of the land, cannot show a readiness to pay the money at the time it became due, he is liable for interest on it from that time.---*Conwell* vs. *Claypool*, 8 Blackf. 124.

If land be conveyed in fee-simple on condition subsequent and the condition be not performed, the estate may be defeated by the entry of the grantor or his heirs, but until such entry, the grantee or his heirs will hold the land. --*Cross et al.* vs. *Carson*, 8 Blackf. 138.

The minority of the heirs of the grantee does not excuse them from the performance of the condition.---*Ibid.*

A stranger to the deed can take no advantage of the breach of the condition. ---*Ibid.*

Nor has a creditor of one of the heirs of the grantor any remedy against the land, unless it be by an execution at law against that portion of it which may belong to such heir after the right of entry shall have been exercised.---*Ibid.*

A purchaser of real estate cannot be compelled to take only a part of the land for which he has contracted. If he cannot get the whole, he has a right to rescind the contract; but he has also a right, generally, to insist that the vendor shall

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Contracts for real estate—vendor and purchaser.

perform the contract so far as he is able, and make compensation in damages for the breach of that part of it which he cannot perform.—*Wilson et al. vs. Brumfield et al.*, 8 Blackf. 146.

A purchaser of real estate for value without notice, is not affected by the notice to his grantor.—*Goodtitle d. Cook vs. Cummins*, 8 Blackf. 179.

To sustain a suit for damages on a covenant to convey real estate, the plaintiff must show either a demand of a deed before the suit was commenced, or a sufficient excuse for not making the demand.—*Bowen vs. Jackson*, 8 Blackf. 203.

The covenantor's want of title is a sufficient excuse for not making such demand.—*Ibid.*

The obligee of a title-bond who has entered into possession of the premises under the contract, may, in ejectment against him by the lessee of the vendor, dispute the vendor's title, if he can show that he was induced to make the purchase by the fraudulent representations of the vendor.—*Patterson vs. Doe d. Fisher*, 8 Blackf. 237.

Ejectment for two town lots. The lessors gave in evidence a deed from McG. (who was the patentee of a fraction of land containing the lots in controversy) to C. B., dated February 24th, 1818, for thirty acres of land, described by metes and bounds, and as being the same land on which J. R. then lived; a deed from C. B. to I. B., dated August 28th, 1818, for the same land; and a deed from I. B. to E., one of the defendants, and A. C., dated September 23d, 1818, for two undivided third parts of the same. The lessors also proved the death of A. C., that they were a part of his heirs, and that the other heirs had conveyed their interest in the thirty acres of land (which include the premises described in the declaration) to them. The defendants were in possession at the commencement of the action.

The defendants gave in evidence a deed from McG. to E. and one J., conveying to them one hundred and thirty acres of land in fee simple (describing the same by metes and bounds,) "with the exception of thirty acres heretofore (theretofore) conveyed to C. B." This deed bore date June 20th, 1817. The land described in it includes the thirty acres mentioned in the deeds adduced by the lessors.

The lessors then proved that J. R. (who was dead at the time of the trial) lived on and occupied said thirty acres of land during the years 1816, 1817, and a part of 1818; and they offered to give in evidence his admissions that he held the land as the tenant of C. B., which evidence being objected to was rejected.

The court instructed the jury that if the deed to E. and J. was the oldest one given in evidence, they should find for the defendants.

Held, that the exception in the deed to E. and J. was valid on its face. Held, also, that the evidence rejected should have been admitted. Held, also, that the instruction to the jury was erroneous.—*Doe d. Chandler et al. vs. Evans et al.*, 8 Blackf. 322.

A vendee of real estate filed a bill in chancery to restrain the vendor from the collection of the purchase-money, until the latter should pay off a mortgage on the land according to his agreement. Held, that it was not essential to the success of the suit that the complainant should have tendered back to the defendant a deed for the land, nor that he should have offered to account for the rents and profits.—*Addleman vs. Mormon*, 7 Blackf. 31.

The purchaser of real estate incumbered by a mortgage, cannot, because of the mortgage, defend an action for the purchase-money, without having first extinguished the incumbrance to the amount of the debt sued for.—*Buell vs. Tate*, 7 Blackf. 55.

But if the incumbrance exceed the debt, the purchaser may, in a court of chancery, have the collection of the debt enjoined, until the incumbrance be reduced to an amount not exceeding the debt.—*Ibid.*

A. and B. agreed under seal that A. should sell and convey certain real estate to B., for which the vendor was to receive a certain sum, &c., when there should be made to the purchaser a good and sufficient deed for the property. Held, that this contract meant that A. himself should execute the deed. Held, also, that B.'s subsequent consent by parol to accept a deed for the property executed by a third person, and A.'s tender of such deed to B., did not authorize A., in case of non-payment, to sue B. on the original contract.—*Smith vs. Addleman*, 7 Blackf. 119.

A bill in chancery alleged the following facts: A. purchased from a county agent a certain town lot, paid the purchase-money except a small sum, received a title-bond, and was put in possession. The obligee sold the lot to B., B. sold to C., C. sold to D., D. sold to E., who made valuable improvements. E. sold to F., who sold to the complainant. The title-bond remained with the obligee unassigned

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during the sales to B., &c., and at each of them, the purchase-money was paid, and the purchasers were respectively put into possession. The complainant, soon after his purchase, obtained from F. an order on the obligee for an assignment of the bond, &c. The obligee acknowledged F.'s right to control the assignment, but afterwards, at F.'s request, assigned the bond to him. Held, that the case was not within the statute of frauds, and that the bill was sufficient. Held, also, that the court was competent to decree that F. should assign the bond to the complainant, that the obligee should pay the county agent the part of the purchase-money due him, and that, on such payment, the agent should convey the lot to the complainant.—*Underhill* vs. *Williams et al.*, 7 Blackf. 125.

On the purchase of certain real estate, part of the purchase money was paid, and promissory notes, payable at specified times with interest, were given for the residue. The vendor, at the time of the purchase, gave the vendee a title-bond, the condition of which stated that it was agreed between the parties, that if said notes and interest were not paid at maturity, the bond should be void, and the money paid forfeited to the vendor; or if on payment of said notes and interest as aforesaid, the vendor or his assigns should make a warranty deed in fee-simple for the property to the vendee or his assigns, then the bond to be void. Held, that the vendee was not bound to pay the notes, but that he might abandon the contract and forfeit the money paid.—*Peterson et al.* vs. *Dickey*, 8 Blackf. 427.

A vendor of certain town lots gave the vendee a title-bond conditioned for the making of a deed for the lots on payment of certain notes, which were taken for the purchase-money, and were payable two years after date. Held, that a suit on the notes would not lie, unless the vendor had made or offered to make a deed for the lots, or could show a sufficient reason for his failure to do so.—*Stingle et al.* vs. *Hawkins*, 8 Blackf. 435.

A. and B. his wife conveyed certain real estate to C. and D., on condition that the grantors should be permitted to continue to occupy the house on the premises, and that the grantees, their heirs, executors and administrators, should furnish the grantors a decent and comfortable support during their (the grantors') lives. Held, that said condition was a condition subsequent; and that if the possession of said house and a suitable support were not furnished to B. after the death of her husband, she might claim her dower in the premises.—*Hefner et al.* vs. *Yount et al.*, 8 Blackf. 455.

If at the time of A.'s assignment of an agreement for the purchase by him of real estate, the premises are occupied by a third person, such occupancy is constructive notice to the assignee of the occupant's title.—*Campbell* vs. *Brackenridge et al.*, 8 Blackf. 471.

But if the possession is vacant, the assignee need not inquire of the late occupier what was the nature of his title, and will not be held to have implied notice of the information which he might have obtained by inquiry.—*Ibid.*

Where a person enters into possession of real estate under a contract of sale, the vendor may, at any time previously to executing the conveyance, demand possession of the premises, and may also, if the demand be not complied with, recover the possession of them in an action of ejectment.—*Doe d. Brumfield* vs. *Brown*, 7 Blackf. 142.

The statute concerning tenants holding over, which requires three months' notice to quit, is not applicable to the above-named case, there being in that case no tenancy in which rent is reserved.—*Ibid.*

Debt on a sealed note for the payment of money. Plea, that the consideration of the note was certain land (describing it) belonging to one A., an infant; that at the time the note was given, the land was sold at private sale to the defendant by one B., a commissioner appointed by the probate court for that purpose; that three notes were given by the defendant for the payment of the purchase-money by instalments, on one of which notes, being the last one due, this suit is founded; that at the time the notes were given, B., as commissioner as aforesaid, executed his bond obligating himself to convey all the right and title of A. in said land to the defendant, on payment of the purchase-money, provided the sale should be confirmed, but if set aside, the notes were to be returned to the defendant; that B. has not made or tendered, nor offered to make or tender to defendant a conveyance for the land either absolutely or conditionally, or otherwise, but has hitherto failed to do so; that he cannot make such conveyance, and the consideration of the note has therefore failed, &c. Held, that the plea was good.—*Henton et al.* vs. *Beeler*, 7 Blackf. 150.

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A vendor's lien on real estate for unpaid purchase money may be enforced against a purchaser from the vendee with notice.—*Pierce* vs. *Gates*, 7 Blackf. 162.

A note for the payment of money, and a mortgage on real estate to secure its payment, were assigned, and the assignee obtained judgment at law on the note against the maker. The mortgaged premises were afterwards sold on execution on the judgment to the judgment-creditor. Held, that the purchase was a discharge of the judgment to the value of the mortgaged premises.—*Johnston et al.* vs. *Watson*, 7 Blackf. 174.

If real estate occupied by a tenant be sold, the vendee is entitled to the rents which accrue after the sale, unless they have been paid, before notice of the sale, to the vendor.—*Sampson* vs. *Grimes*, 7 Blackf. 176.

If a purchaser of real estate from A. pay the purchase money, receive a title-bond conditioned for a conveyance at a future time, and be put into possession, and a subsequent purchaser from A. with notice get possession afterwards, an assignee of the title-bond may, in equity, recover the possession from such subsequent purchaser.—*Hedges* vs. *Bird et al.*, 7 Blackf. 215.

The vendor's lien on real estate for unpaid purchase-money passes to his assignee of a note for the money, and may be enforced by a suit in equity by such assignee against a purchaser from the vendee with notice.—*Brumfield et al.* vs. *Palmer*, 7 Blackf. 227.

And the circumstance that the original vendor in such case had not a good title when he was to have conveyed, (the contract being unrescinded, and a good title having been obtained and tendered by him before the suit was commenced) is not a sufficient defense.—*Ibid.*

A vendor of real estate having an equitable lien on it for part of the purchase-money, is not obliged (the vendee having absconded) to proceed against the land by attachment; but he may enforce his lien in equity.—*Russell* vs. *Todd*, 7 Blackf. 239.

A purchaser of real estate, *pendente lite*, will be bound by the decree.—*Green et al.* vs. *White*, 7 Blackf. 242.

A purchaser of an equity of redemption of real estate cannot support an action of ejectment, commenced before the revised statutes of 1843, for the mortgaged premises, against the purchaser of them from the mortgagee.—*Butler et al.* vs. *Doe d. Rockafellar*, 7 Blackf. 247.

The vendor of real estate took a promissory note for a part of the purchase-money payable some months after date, considering the buyer able to pay. When the note fell due, the payee proposed to the maker that if the latter would pay him a part of the money, he would give a credit of several months longer for the balance. The payment of part was accordingly made, the old note taken up, and a new one given for the balance payable at a future day. When the new note was given, the maker had sufficient property, besides said land, to pay the debt; and the complainant afterwards endeavored, without effect, to collect the debt by a suit at law. Held, that these circumstances did not affect the vendor's equitable lien on the land sold for the unpaid purchase-money.—*Aldridge* vs. *Dunn et al.*, 7 Blackf. 249.

A purchaser of real estate for valuable consideration and without notice, is not bound by an equitable lien on the land for unpaid purchase-money; but the law is otherwise as to judgment-creditors.—*Ibid.*

A. purchased at the land office a tract of land, and took a duplicate receipt for the purchase-money, and then sold and assigned the certificate of purchase to B., retaining the duplicate receipt. Afterwards, A., being in possession of the land, sold the same to C., and gave him a bond conditioned for a conveyance at a future time. Held, that A.'s retaining the duplicate receipt, did not affect B.'s priority of claim to the land.—*Godfroy et al.* vs. *Cushman et al.*, 7 Blackf 253.

If by a contract for the sale of real estate, the purchase-money is to be paid *before* the execution of the deed, it is no defense to a suit on a note given for purchase-money, that the deed had not been made or tendered.—*Davis* vs. *Heady*, 7 Blackf. 261.

If to a suit on a note given in payment for land, &c., the defendant plead that the vendor had no title, that he had not conveyed, &c., a replication that the consideration had not failed as alleged, is good.—*Ibid.*

Assumpsit. The first count was as follows: That on the 28th of December, 1840, the defendant sold to the plaintiff a lot of ground numbered 12 in the town of Richmond, and, on the sale thereof, executed to the plaintiff a

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penal bond in the sum of 1,000 dollars, with a condition, which, after reciting the said sale for the sum of 500 dollars payable as follows, 100 dollars in hand, a note for 100 dollars payable on the first of October 1841, and a note for 300 dollars payable on the first of October, 1842,—was for the executing, by the defendant to the plaintiff, of a good and sufficient warranty deed for the said lot on the payment of said notes; that, on the execution of said bond, the plaintiff paid the defendant the 100 dollars in cash, and executed the notes in the condition of the bond mentioned, and entered into possession of the lot; that, at the time of said sale, there was an unpaid mortgage on the lot previously executed by one A., the former owner of said lot, before the defendant had any title to it, to one B., for the sum of 300 dollars, of which mortgage the plaintiff was ignorant until long after his purchase; that, afterwards, in 1842, the lot was sold under a decree on the mortgage, and the purchaser under the decree turned the plaintiff out of possession; that the defendant, therefore, was unable to make the plaintiff a title to the lot; and that the plaintiff, before notice of the mortgage, had made valuable improvements, &c.; yet the defendant, though often requested, had refused to pay the 100 dollars paid on the lot, or to pay for the improvements. Held, that this count was bad; it containing no promise on which the action could be supported.—*Ferguson* vs. *Rhoades*, 7 Blackf. 262.

The second count was for money had and received, &c. One ground relied on to support this count was, that the defendant had no title to the lot sold to the plaintiff as stated in the first count; and to show such want of title, the mortgage, decree, and sale under the decree, mentioned in the first count, were proved. Held, that, the mortgagor's title not being proved, the evidence was insufficient.—*Ibid.*

Assumpsit by the assignee of the payee of a promissory note against the maker. The note was dated the 1st of December, 1836, and payable 90 days after date. Plea, that the note was executed in part consideration of certain town lots; that on the execution of the note, the payee gave his title-bond to the defendant, the condition of which (after reciting that he had received one-third of the purchase-money, and the defendant's note for the residue payable in three years) was for a conveyance of the lots to the defendant on payment of the residue of the purchase-money; that four years elapsed after said notes and bond were given before this suit was commenced; that the note sued on was given for the one-third of the purchase-money alleged in the bond to have been paid; and that the payee did not on the 1st of December, 1839, or at any time previously, execute or offer to execute to the defendant a deed for the lots; wherefore the consideration of the note had failed. Held, that the plea was bad.—*Cox et al.* vs. *Hazard*, 7 Blackf. 408.

Same point.—*Cox et al.* vs. *Wells*, 7 Blackf. 410.

To debt on bond conditioned for the conveyance of real estate within a certain time, the defendant may plead that the deed had not been demanded before the commencement of the suit.—*Brown et al.* vs. *Hart*, 7 Blackf. 429.

But it is not necessary that the holder of such bond should prepare the deed and present it to the obligor to be executed.—*Ibid.*

A vendor claiming a lien on land for a part of the purchase-money due, and purchasing the same land sold on execution subject to such lien, thereby extinguishes the debt so claimed as a lien, to the extent of the value of the land purchased, after deducting the sum paid on such sale.—*Murphy* vs. *Elliott*, 6 Blackf. 482.

Debt by the assignee of the payee of a promissory note against the maker. Plea, that the note was given in part consideration of a tract of land sold and conveyed by the payee to the defendant, of which the former falsely and fraudulently represented himself to be seized; that the payee, at the time of the sale, had no title to the land; and that the defendant had not taken possession, &c. Held, that the plea was good.—*James* vs. *The Lawrenceburgh Ins. Co.*, 6 Blackf. 525.

A person in possession of real estate under a bond conditioned for a title on payment of the purchase-money, has not such an adverse possession as will invalidate a conveyance made by the owner, during such possession, to a third person.—*Allen* vs. *Smith*, 6 Blackf. 527.

The vendor of real estate, by taking the vendee's promissory note for the purchase-money payable at a future time, with a third person as surety, waives his

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equitable lien on the land for such money, unless there be an express contract that the lien shall be retained.—*Boon et al.* vs. *Murphy et al.*, 6 Blackf. 272.

A note payable one day after date was given for the price of certain town lots, the title for which was to be made by the plaintiff to the defendant on payment of the purchase-money, and a demand of the deed. Held, that it was no defense to a suit on the note, that the deed had not been made or offered before the suit was commenced. Held, also, that it was no defense to such suit that, at the time of the sale, the plaintiff represented to the defendant that there was an alley on one side of the lots, and that the plaintiff had since conveyed to a third person the land adjoining the lots and embracing the alley, if the plaintiff's plat of the lots, on which the alley was designated, was recorded before the execution of the conveyance. Held, also, that had such conveyance been material in the cause, the record of it would have been admissible evidence for the defendant, without accounting for the absence of the original.—*Daniels* vs. *Stone*, 6 Blackf. 450.

If a person shall sell real estate to be afterwards paid for, and contract to make a title to the purchaser on payment of all the purchase-money, it is not necessary to a recovery in a suit on a note for part of the purchase-money (the residue having been paid,) that a deed be executed or unconditionally tendered before the commencement of the suit.—*Burrows et al.* vs. *Yount*, 6 Blackf. 458.

If a deed in such case be offered when the note falls due, or within a reasonable time afterwards, on payment of the note being made at the time of delivering the deed, the suit may be brought.—*Ibid.*

If a person having obtained a decree in chancery for certain land and been put into possession, sell the land to a *bona fide* purchaser for value before a suit in error to reverse the decree is commenced, the title of such purchaser, or of those claiming under him, will not be affected by a subsequent reversal of the decree.—*M'Cormick et al.* vs. *M'Clure et al.*, 6 Blackf. 466.

And if after such decree is reversed and the bill dismissed, a writ of restitution be opposed on the ground, supported by affidavit, that the facts are as above stated, the writ will be refused.—*Ibid.*

If a person who has contracted with another to convey to him certain real estate, die without having executed the conveyance, leaving several heirs, one of whom is a minor, the purchaser is not bound to accept a deed for the land from the adult heirs, and a bond of the guardian of the minor with surety, conditioned for the minor's conveyance when he shall come of age.—*Barickman* vs. *Kuykendall*, 6 Blackf. 21.

If a person enter into a legal contract for the purchase of real estate, pay part of the purchase-money, and occupy the premises some time under the contract, he cannot, on the vendor's breach of his agreement to convey, rescind the contract, and recover back the money paid in *indebitatus assumpsit*; his only remedy, in such case, being on the special contract.—*Ibid.*

A sale and conveyance of real estate in the adverse possession of a third person, made by commissioners under an order of court in a suit for partition, are not a valid consideration for a note given for the purchase-money.—*Martin et al.* vs. *Pace et al.*, 6 Blackf. 99.

If a person out of possession convey land held adversely by a third person, the conveyance is void on the ground of maintenance, and the title of the land remains in the grantor.—*Ibid.*

If a tract of land be sold with a representation that it contains a certain number of acres, and there be a deficiency in the quantity, the vendee is entitled to an abatement of the purchase-money for so much as the quantity falls short of the representation.—*Howk* vs. *Pollard*, 6 Blackf. 108.

If a father purchase real estate with his own money in the names of his children, the purchase is an advancement to the children, and not a resulting trust for the father.—*Stanley* vs. *Brannon et al.*, 6 Blackf. 193.

Such a purchase is not within the statute against fraudulent conveyances; and, therefore, a subsequent purchaser, though *bona fide*, will not be relieved against it. But if such purchase were within the statute, still a subsequent purchaser with notice could not take advantage of it.—*Ibid.*

If a subsequent purchaser from the father in such case, obtain a decree for the land against the father and the children, the decree saving to the children, who are infants, the right to show cause against it when they come of age,—and such purchaser afterwards sell the land to a third person—the circumstance that the latter's purchase was made whilst the decree was in force, will not, even though

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his purchase was *bona fide*, prevent the children, when they come of age, from having the decree and his conveyance set aside.—*Ibid.*

A. executed a promissory note to B., in consideration that the latter would convey to him, by deed with full covenants, a certain tract of land. By virtue of an execution on a judgment existing against B. at the time of the contract, the land was subsequently sold by the sheriff to C.; and after such sale on execution, B. and wife executed to C. a deed with general warranty for the land. Afterwards, deeds for the land to A., by B. and wife with full covenants, and by C. and wife with covenants against C. and those claiming under him, were tendered to A., and payment of the note demanded. Held, that A. was not bound to accept the deeds and pay the note.—*Reynolds* vs. *Smith et al.*, 6 Blackf. 200.

Debt by the assignee of a sealed note for 300 dollars, against the maker. Plea in bar, that the payee represented himself to be the owner of two certain town lots, and falsely stated them to be unincumbered; that in consequence of these statements, the defendant bought the lots of the payee for 1,500 dollars; that the note sued on was given in part payment; that the payee, at the time of the sale, gave his bond to the defendant conditioned for a general warranty deed for the lots on payment of the purchase-money; that the payee had, previously to the sale, mortgaged one of the lots for 400 dollars, and the mortgage remained unsatisfied; that the payee was insolvent, and unable to make an unincumbered title to the mortgaged lot which is worth 1,000 dollars. Held, that the plea was in substance sufficient.—*Bowers* vs. *Trevor*, 5 Blackf. 24.

Replication to the above plea, that the note was not given in consequence of the false representations alleged in the plea, but for a good and valid consideration; that at the time of contract of sale mentioned in the plea, and in consideration of which the note declared on was given, besides that note and 300 dollars in hand paid, the defendant executed to the payee three other notes of 300 dollars each, for the balance due on the lots, one payable in 1839, one in 1840, and one in 1841, which are still unpaid. Held, on general demurrer, that the replication was bad.—*Ibid.*

The declaration in debt on a bond conditioned that the defendant would, on the first of June, 1838, make the plaintiff a sufficient deed of conveyance in fee simple for a certain tract of land, averred that the defendant did not make the deed on the said day nor at any other time, and that the defendant had no title to the land. Pleas, 1st, a tender of the deed on the 27th of October, 1838; 2dly, that on the 1st of June, 1838, and ever since, the defendant was ready to make the deed, but it was not demanded. Held, on general demurrer, that both the pleas were bad.—*Hunt et al.* vs. *Reeves*, 5 Blackf. 177.

Indebitatus assumpsit for the price of land sold and conveyed. Plea, the general issue. The facts proved were as follows: In consequence of an agreement between the parties, the plaintiff conveyed to the defendant a tract of land valued at 1,800 dollars, for the price of which this suit was brought; and the defendant, in exchange for said land, gave the plaintiff a bond for a conveyance of a certain quarter section of land valued at 800 dollars, and also paid or secured to him 1,000 dollars. The conveyance of the quarter section of land, which was situate in a distant part of the State, and which the plaintiff had never seen, was made within the time limited for its execution by the title-bond; but the deed omitted to state the number of the range in which the land was situate, of which omission both parties were then ignorant. The plaintiff discovering afterwards that the defendant had misrepresented, at the time of the contract, the location and quality of the quarter section of land, demanded of him its estimated value, viz: 800 dollars—offering to return the deed for the same. The defendant refused to receive the deed or pay the money, but offered to correct the mistake in the description of the land. Held, that the evidence did not sustain the action.—*Rinker* vs. *Sharp*. 5 Blackf. 185.

Debt on a writing obligatory for the payment of money. Plea, as to part, &c., that the obligation was given for certain real estate of a decedent, sold to the defendant by the plaintiffs as commissioners under an order of the probate court; that, at the time of the sale, there was a judgment, &c. against one of the heirs of the decedent, whose share of the estate was afterwards sold under an execution on the judgment; and that the plaintiffs, at the time of their sale to the defendant, fraudulently concealed the judgment, &c. Held, that the plea was bad.—*Loudon et al.* vs. *Robertson et al.*, 5 Blackf. 276.

A bill in chancery was filed in the circuit court to enforce an equitable lien on real estate for a part of the purchase-money; and the complainant obtained

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Contracts for real estate—vendor and purchaser.

a decree, under which the estate was sold. The decree was afterwards reversed by the supreme court. Held, that the sale being made before the reversal was valid.—*Doe d. Noble et al.* vs. *Swiggett*, 5 Blackf. 328.

A plea in bar to a suit on a sealed note for the payment of money, stating the note to have been given for certain real estate, and setting forth several representations made by the plaintiff respecting the property, which, it is alleged, were false and fraudulent, is insufficient if it do not aver a reconveyance of the property or that which is equivalent.—*Post* vs. *Shirley*, 5 Blackf. 430.

If a person contract to convey certain real estate on the day on which a note given for the purchase-money is made payable, or as soon as the note shall be paid, he may sue on the note without having offered, &c. to execute the deed on the day the note fell due, provided he have, within a reasonable time afterwards, offered to make the deed upon being paid the note at the same time.—*Owen* vs. *Norris*, 5 Blackf. 479.

But the deed offered in such case must be for all the land contracted for.—*Ibid.*

If a person purchase such estate with notice, actual or constructive, of an outstanding equitable title, his legal title will not affect the outstanding equity.—*Bryan* vs. *Blythe*, 4 Blackf. 249.

The occupancy of the estate by a third person, whether the purchaser have a knowledge of it or not, is constructive notice to the purchaser of the occupant's title.—*Ibid.*

The purchaser of an estate with notice of an outstanding equity, is as much bound as his vendor was to perform the prior contract.—*Ibid.*

If in the case of a sale of real estate, the deed is to be made and the price paid on the same day, the vendor cannot sue for the price unless he has, of his own accord, performed or offered to perform his part of the contract.—*Warner* vs. *Hatfield*, 4 Blackf. 392.

To such suit, a plea stating that the plaintiff had not executed the deed, (omitting to state that he had not offered to execute it,) is insufficient.—*Ibid.*

A contract to execute a good and sufficient title to real estate cannot be complied with, whilst a part of the premises are held by third persons under unexpired leases.—*Ibid.*

A conveyance of real estate was, by the contract of the parties, to be executed on payment of the purchase-money; and the money was to be paid on or before the first of May, 1834. The money was tendered, and the deed demanded, on the 29th of April, 1834. Held, that the tender and demand were valid.—*Barbee* vs. *Inman*, 4 Blackf. 420.

If the vendor in such case, having by the contract the right to designate the point, between two given points, for the beginning corner of the tract, refuse, when properly applied to, to exercise that right,—the point may be designated by the vendee.—*Ibid.*

A. purchased of B. a certain tract of land for the sum of 250 dollars. He paid 100 dollars in hand, and gave his notes for the residue of the purchase-money; and B. gave him a bond conditioned for a conveyance when the notes should be paid. There was a mortgage on the land at the time in favor of C., of which A. had no knowledge; and B. fraudulently represented to A. that the land was unincumbered. The payments afterwards made by A. to B., with the mortgage debt which he also paid, amounted to the sum due on the notes. On a bill in chancery filed by A., the court decreed that he was entitled to a conveyance, and appointed a commissioner to execute the deed. It was further decreed that the notes should be delivered up to the complainant.—*Rodman* vs. *Williams*, 4 Blackf. 70.

The purchaser of real estate in the possession of a third person, is bound to take notice of such person's title to the possession, whether his title be legal or equitable.—*Johnston* vs. *Glancy et al.*, 4 Blackf. 94.

Debt on a sealed note for the payment of 100 dollars. Plea, that the note was given in part consideration of a certain half quarter section of land, received by the defendant from the plaintiff in exchange for another tract; that at the time of the contract, and to induce the defendant to make it, the plaintiff represented to him that he had measured the half quarter section of land, and that it included a certain field, and a certain piece of bottom land containing 15 acres; that the defendant, ignorant of the boundaries of the land, and relying on the plaintiff's representation, made the exchange and gave the note; that the defendant has

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Notices—record in case of an adjournment—corporation, where sued.

Notice.

SEC. 792. In all cases where notice is required by this act, it must be in writing, and may be served by the proper officer or any other person.

Record to show reason of adjournment of court.

SEC. 793. If any judge of the circuit court, or court of common pleas, shall adjourn the court before having gone through the business pending, and before the expiration of the time fixed by law, the record must show the reason for adjournment.

Husband and wife, when may join in action.

SEC. 794. Husband and wife may join in all causes of action arising from injuries to the person or character of either and both of them, or from injuries to the property of either and both of them, or arising out of any contract in favor of either and both of them.

SEC. 795. Any person required to give bail, may deposit with the clerk, the amount of money for which he is required to give bail, and thereupon be discharged from arrest.

Corporation, where sued.

SEC. 796. Any action against a corporation may be brought in any county, where the corporation has an office for the transaction of business, or any person resides upon whom process may be served against such corporation, unless otherwise provided in this act.

since discovered that the land so received by him does not include the field or bottom land, and that it is not worth as much by 200 dollars as it would have been had its situation been as the plaintiff represented it. Held, on demurrer, that the plea was a bar to the action.—*Cowger* vs. *Gordon et al.*, 4 Blackf. 110.

If the vendor of real estate undertake to point out to the purchaser the boundaries of the land, or the place where it lies, or its improvements, he does it at his peril, and is liable for any mistake in the description.—*Ibid.*

A person being in possession of 80 acres of land belonging to the United States, upon which he had erected a mill, but to which land he had no claim, sold his possession for 350 dollars and received the purchase-money. He informed the purchaser, at the time of the contract, that he had no title, and that the land belonged to the United States. The purchaser afterwards sued the vendor, in *indebitatus assumpsit*, to recover back the purchase-money. Held, that the action could not be sustained.—*Vest* vs. *Weir et al.*, 4 Blackf. 135.

Two persons made a written agreement, by which one of them agreed to sell to the other certain real estate. A part of the price was to be paid on a subsequent day, and notes were to be given for the payment of the residue in equal annual instalments. After all the payments should be made, the conveyance was to be executed. There was nothing said in the agreement respecting the possession of the premises. Held, that the legal inference from the contract was, that the possession was to be given when the deed should be executed.—*Holmes* vs. *Schofield et al.*, 4 Blackf. 171.

The vendor of a tract of land containing a certain number of acres, brought a suit against the vendee for the purchase-money. The defendant who retained the land, but who wished to have a reduction of the price, proved that a certain field, which the vendor had represented to be included in the premises, was not so included. Held, that the question whether the land was worth less, and if so, how much less, than it would have been had the boundaries not varied from the description, was a proper subject of inquiry; and that the plaintiff, as well as the defendant, had a right to introduce evidence on the subject.—*Gordon et al.* vs. *Cowger* 4 Blackf. 231.

That the vendor of real estate has no title to the property, is a good defense to an action against the purchaser on a bond executed by him for the purchase-money, whether the suit be brought by the obligee or assignee of the bond.—*Bryan* vs. *Blythe et al.*, 4 Blackf. 249.

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Statutes, how construed.

ARTICLE XLVIII.

Rules of Construction and repeal of Statutes.

Certain words, how construed.

SEC. 797. In the construction of this act, the following rules shall be observed, when consistent with the context:

Sheriff.

The word "*sheriff*" means the sheriff of the county, or any other person authorized to perform his duties in any case.

Clerk.

The word "*clerk*" means the clerk of the court, or any person authorized to perform his duties in any case.

Of unsound mind.

The phrase "*of unsound mind*," includes idiots, non-compotes, lunatics, and distracted persons.

Oath.

The word "*oath*," includes the word affirmation; and the phrase "*to swear*," includes to affirm.

Person.

The word "*person*," extends to bodies politic and corporate.

Under legal disabilities.

The phrase "*under legal disabilities*," includes married women, persons within the age of twenty-one years, or of unsound mind, or imprisoned, or out of the United States.

Bond.

The word "*bond*," as used in this act, does not necessarily imply a seal; but in other respects means the same kind of instruments as heretofore.

Land, real estate, real property.

The word "*land*," and the phrases "*real estate*," and "*real property*," include lands, tenements and hereditaments.

Personal property.

The phrase "*personal property*," includes goods, chattels, evidences of debt, and things in action.

Property.

The word "*property*," includes personal and real property.

Judgment.

The word "*judgment*," means all final orders, decrees and determinations in an action; also, all orders upon which executions may issue.

Money demands on contract.

The phrase "*money demands on contract*," when used in reference to an action, means any action arising out of contract, where the relief demanded is a recovery of money.

Attorney.

The word "*attorney*," includes a counsellor, and every other person authorized to appear and represent a party in an action or special proceeding, in any stage thereof.

Verified.

The word "*verified*," when applied to pleadings, means supported by oath or affirmation.

Number and gender.

SEC. 798. Words importing the singular number only, may also be applied to the plural of persons and things; and words importing the masculine gender only, may be extended to females also.

Actions now pending.

SEC. 799. In actions already commenced, the pleadings to be had to form issues, the manner of procuring testimony, the examination of parties, the trial and rendition of judgment, and all other proceedings, shall conform to the provisions of this act, as far as practicable.

SEC. 800. The provisions of this act shall be liberally

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construed, and shall not be limited by any rules of strict construction.

SEC. 801. No part of this act shall be retroactive, unless expressly so declared.

Repeal. SEC. 802. All laws inconsistent with the provisions of this act, are hereby repealed; but the repeal shall not operate to revive any former act. The laws and usages of this State relative to pleadings and practice in civil actions and proceedings, not inconsistent herewith, and as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force.

SEC. 803. All rights of action secured by existing laws, may be prosecuted in the manner provided in this act. *

CHAPTER 2.

AN ACT to establish Courts of Conciliation; to prescribe rules and proceedings therein, and compensation of Judges thereof.

[APPROVED JUNE 11, 1852.]

Jurisdiction of court. SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That courts of conciliation are vested with jurisdiction of claims and controversies submitted to them for the purpose of effecting a compromise, or for determination in the cases, and in the manner prescribed in this act.

When and by whom held. SEC. 2. A court of conciliation may be held in each of the counties in this State by the judge of the court of common pleas, on any judicial day, and wherever the judge may happen to be within his judicial district.

Cases cognizable in such court. SEC. 3. Any person claiming to have a cause of action against another for libel, slander, malicious prosecution, assault and battery, or false imprisonment, may serve on him a written notice, briefly stating the alleged cause of action, and requiring him to appear in relation thereto, before the court of conciliation of the county where the notice is served, at a place and time therein stated, not less than five days from the time of service.

Service of notice. SEC. 4. The notice may be served by the sheriff, or any other person, in the same manner as a summons in a civil action.

Hearing of the cause. SEC. 5. At the time specified in the notice, or at such other time as the hearing may be adjourned to by the court, the parties appearing must be received by the judge, apart

* See post, R. S., vol. 2, title "Construction of Statutes."

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from all other persons, except that an infant must be attended by a guardian, and a female by her husband, or friend; and thereupon it is the duty of the judge to hear the allegations and explanations of the parties, to inform them of their respective rights, to endeavor to reconcile their differences, and advise such a compromise of the claim or controversy as he may deem just.

Reconciliation.

SEC. 6. If a reconciliation be had, a memorandum thereof stating the nature of the controversy, or alleged cause of action, the appearance of the parties, and the fact of the reconciliation, without specifying the terms thereof, unless it be agreed by the parties to specify them, must be entered in a book of record, to be kept by the judge, and signed by the respective parties. The reconciliation thus effected is the final determination of the matter in controversy, and is a bar to an action by either party in respect thereto.

Judgment.

SEC. 7. If the parties agree to a judgment, in favor of one against the other in settlement of their differences, the judge may enter the judgment at the foot of the entry of reconciliation. A transcript of such judgment certified by the judge may be filed in the office of the clerk of the court of common pleas, and shall thereupon have the same effect and be enforced in the same manner as a judgment of the court.

Entry in case of a disagreement.

SEC. 8. If, after the service of the notice prescribed in section 3, either party fail to appear, or if the parties appearing, be not reconciled as mentioned in sections 6 and 7, or do not enter into the submission and agreement mentioned in section 14, it is the duty of the judge to make an entry in his book of record, stating in a summary manner the nature of the charge, the notice given, the proof of service thereof, the failure to appear of either party, or the appearance of the parties and their failure to be reconciled.

Evidence of entry.

SEC. 9. The entries in such book of record, or certified copies thereof, signed by the judge, are evidence of the facts therein stated; and it is the duty of the judge to give a transcript of the entries in any case, certified by him, from his record, to either party on request.

Costs not to be recovered, &c.

SEC. 10. In any action hereafter brought for the recovery of damages for a cause of action mentioned in section 3, except when the defendant is arrested, the plaintiff cannot recover costs unless he produce at the trial the certified copy mentioned in section 9, and unless it thereby appear that the notice was duly served, and that he appeared pursuant thereto, or that both parties appeared without notice. The defendant cannot recover costs in such action, when it appears that, after service of the notice, he failed to appear pursuant thereto.

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Parties may submit case to the court.

SEC. 11. When any cause of action is claimed or alleged by or against any person, for which a civil action might be brought, or when a controversy exists between two or more persons, arising out of such alleged cause of action, the parties may appear, for the purpose of effecting a compromise, or of having a determination of all or of any of such claims or controversies before the court of conciliation, at any place within the county in which either party resides.

Appearance and reception in such case.

SEC. 12. Upon the appearance of the parties for the purpose of effecting a compromise as provided in the last preceding section, the court must receive them as prescribed in section 5, and require them respectively to state the nature of the controversy between them, and present such claim as either may allege against the other. The statement may be made by either or both of the parties, either in writing or verbally.

Memorandum and judgment.

SEC. 13. In the cases mentioned in the last preceding sections, if a reconciliation be had, a memorandum shall be entered by the judge, and with like effect as prescribed in section 6; judgment may also be entered and transcript thereof filed in the manner and to the effect prescribed above.

Entry of submission and agreement.

SEC. 14. If, instead of a reconciliation, the terms of which are settled between the parties, they voluntarily submit their matters in difference to the court, and agree to abide the judgment, such submission and agreement must be entered in the book of record and signed by the respective parties; and on the hearing the court may take the statements of the parties, with or without oath; but if either party be examined on oath, as to any matter, the adverse party must be examined on oath as to the same matter. The judgment of the court, made in any cause thus submitted, shall have the same effect, and may be enforced in the same manner as the judgment mentioned in section 7.

Fee of judge.

SEC. 15. In the cases mentioned in the last preceding section, the judge shall be entitled to a fee of five dollars, to be paid one-half by each party.

Same.

SEC. 16. When a reconciliation is effected between parties in any case under the provisions of this act, the judge of the court of conciliation shall be entitled to receive a fee of five dollars, one-half to be paid by each party.

Same.

SEC. 17. When a reconciliation is not effected, no fee whatever can be received by the judge for any services rendered.

Case to be determined.

SEC. 18. A court of conciliation must determine every controversy submitted to it for determination, according to conscience and right without regard to technical rules.

Fees to be in addition to salary.

SEC. 19. All fees paid to the judge by the parties under the provisions of this act belong to him as an addition to his

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stated salary as judge of the court of common pleas, and may be collected by fee bill. The judge shall not receive any other compensation from the parties or any other person, directly or indirectly.

SEC. 20. No party to any admission or declaration, made before the court of conciliation, is bound thereby, or responsible therefor, in any other judicial proceeding whatever, except as provided in this act. Admissions not to bind party.

CHAPTER 3.

AN ACT relative to Arbitrations and Umpirages.

[APPROVED FEBRUARY 3, 1852.]

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. All persons, except infants, married women, and insane persons, may, by an instrument in writing, submit to the arbitration or umpirage of any person or persons, to be by them mutually chosen, any controversy existing between them, which might be the subject of a suit at law, except as otherwise provided in the next section, and may agree that such submission be made a rule of any court of record designated in such instrument.* Who may submit to arbitration, and in what cases.

* When a cause is pending it may be referred to arbitration by consent of parties, and such submission made a rule of court. At common law, however, if no suit were pending, and any matter in controversy were submitted to arbitration, such submission could not be made a rule of court; but the party was left to his action on the award or arbitration bond. The object of the statute is to give the parties the same remedies that the common law gives in cases referred after the commencement of a suit. See note 1 to the case of *Mills* vs. *Conner*, 1 Blackf. 7; *Titus* vs. *Scantling*, 4 Blackf. 89.

When the reference is made to more than one arbitrator, and it is provided that in case they shall disagree, another shall decide, that other is called an *umpire*. The determination made by an arbitrator or arbitrators is termed *an award*, that by the umpire an *umpirage*, or less correctly an award. The nomination of an umpire is either made by the parties themselves, at the time of their submission, or left to the discretion of the arbitrators. If the arbitrators make an award within the time allowed to them, that shall be considered as the real award; if they make none, then the umpirage shall take place. The umpire has no authority to act absolutely, but only conditionally, if the arbitrators make no award within their time. This applies equally to the case where the umpire is confined to the same time with the arbitrators, and to that where a further time is given to him. The usual course is for the umpire to adopt the opinions of the arbitrators, so far as the arbitrators concur, confining his examination to those points as to which such arbitrators disagree; and he is justified in so doing unless *requested* to examine the witnesses.—See Kyd's treatise on the law of awards.

Either party may revoke the submissoin, subject, however, to the right of the other party to recover of him the damages sustained by such revocation. *Allen* vs. *Watson*, 16 Johns. N. Y. Rep. 205. If the submission be by deed, the revoca-

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Exceptions.

SEC. 2. No such submission shall be made respecting the claim of any person to any estate in fee or for life to any real estate; but any claim to an interest in a term for years, or for one year or less, in real estate, and controversies respecting the partition of lands between joint tenants, or tenants in common, or concerning the boundaries of lands, or concerning the assignment of dower, may be submitted to arbitration.*

Arbitration bonds.

SEC. 3. When an agreement is made according to the preceding sections, the parties shall execute bonds, with condition to abide and faithfully perform the award or umpirage, specifying therein the name of the arbitrator or arbitrators, and the matters submitted to their determination, and an agreement to make the submission a rule of court designated in such agreement of submission.†

Time and place of meeting.

SEC. 4. As soon as such bonds are duly delivered, either party may appoint a time and place for the arbitrator or arbitrators to meet, by giving to the opposite party and to such arbitrator or arbitrators at least ten days' written notice.‡

Oath of arbitrators.

SEC. 5. Before proceeding to hear any testimony, such arbitrator or arbitrators shall be sworn faithfully and fairly to hear and examine the matters in controversy, and to make a just award according to the best of his or their understanding.

tion must be by an instrument of as high a nature. *Wild* v. *Vinor*, Brown 62.—The submission is revoked by the death of either of the parties before the award is delivered.—*Touisant* v. *Hartop*, 7 Taunt. 571.—*Cooper* v. *Johnson*, 2 B. & A. 394.—Marriage of a feme sole is a revocation of the arbitrators' authority, and a breach of the covenant to abide an award.—*Charnally* v. *Winstanley*, 5 East 266.

*See 1 Bac. Abridg., 132. 3 Blacks. comm. 16.

† It is not necessary in an action on a bond, conditioned for the performance of an award, that a plea in bar admitting the execution of the bond, but denying that any award had been made, should be verified by affidavit.—*Titus* vs. *Scantling*, 3 Blackf. 372. *See Dickerson* vs. *Tyner*, 4 Blackf. 253.

An action of debt still lies on an arbitration bond at common law, although such bond contains no agreement that the submission should be made a rule of court.—*Titus* vs. *Scantling*, 4 Blackf. 89.

As to the form of the rule of reference, &c., submission bond, award, and rule for making submission by bond, a rule of court, see 1 Blackf. 433, 456.

Before the time expired when an award was to be made by the terms of an arbitration bond, the parties extended it by written agreement indorsed on the bond. *Held*, that debt would lie on the bond for non-performance of an award made within the enlarged time. *Springer* vs. *Spooner*, 6 Blackf. 545.

‡ Parties to a reference agreed on the day for the meeting of arbitrators and met on that day, when the examination was commenced and adjourned till the next day, when the award was made. *Held*, that no objection could be taken on account of a want of a written notice of the time of meeting of the arbitrators. *Jacobs* vs. *Moffatt*, 3 Blackf. 395.

An award cannot be objected to because ten days' notice of a rule to show cause why judgment should not be rendered on it, had been given. *Ibid.*

The want of notice of the meeting of arbitrators is no objection to an award, if the parties appeared. *Dickerson* vs. *Hays*, 4 Blackf. 44.

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Who to administer.

SEC. 6. Such oath, and the oaths to witnesses, may be administered by any person authorized to administer oaths.

Witnesses.

SEC. 7. Witnesses may be required to attend before arbitrators, on behalf of either party, by subpœnas issued by any justice of the peace, in the same manner, and subject to the same process and penalties for disobedience, to be enforced by such justice as in trials before justices of the peace.*

Proofs and allegations.

SEC. 8. As soon as the arbitrator or arbitrators are ready to proceed to business, the parties may exhibit their proofs; all the arbitrators must meet together and hear the allegations of the parties, but the award of a majority is valid, unless otherwise required by the submission.†

Award to be in writing.

SEC. 9. The award shall be in writing, and signed by the arbitrator or arbitrators who agree thereto, and shall be attested by a subscribing witness.‡

Fees

SEC. 10. The fees of the justice issuing process, and of the witnesses in such case, shall be the same as allowed before justices of the peace, and shall be ascertained and estimated by the arbitrators, and returned with the award, including therein their own fees as allowed by law.§

Copies of award to be given parties.

SEC. 11. A true copy of the award, and of the costs aforesaid, shall be delivered to each of the parties, or left at his last usual place of residence, by any one of the arbitrators, within fifteen days after the signing of such award.

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SEC. 12. If either of the parties shall fail or refuse to comply with such award, the other party may file the same, together with the agreement of submission, in the court named in such submission.

Rule against a non complying party.

SEC. 13. Upon such submission being proved by a subscribing witness thereto, or in case of his death, insanity, or absence out of the State, then by proof thereof as in other cases of a written instrument, and upon the award also being proved in like manner, or by the arbitrators, or any of them; and upon proof that a copy of the award has been duly served on the

* The parties themselves may be examined as witnesses, if the order of reference contain a provision for their examination. *Lloyd* vs. *Archbowle;* 2 Taunt. 324---2 Chitty's Gen. Prac. 101.

† If either party neglect to bring forward before the arbitrators any demand he may have against the other party, which is within the scope of the reference, he forfeits his claim to it. *Stipp* vs. *W. H. Co.*, 5 Blackf. 273.

‡ The validity of an award is not affected by its having appended to it an explanation of a matter not embraced in the submission. The parties would be estopped from contesting the validity of the award.—*Stipp* vs. *The W. H. Co.*, 5 Blackf. 16.

An award in favor of the plaintiff for $30 73, excepting an allowance made by the plaintiff for hauling 620 staves, is void for uncertainty.—*Parker* vs. *Eggleston*, 5 Blackf. 128.

§ See sec. 20 of this chapter; also, R. S. vol. 1, p. 289.

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party against whom the rule is asked, the court shall cause such submission and award to be entered of record, and shall grant a rule thereon against the adverse party, to show cause at that or the succeeding term of the court, why judgment shall not be rendered by such court upon the said award. *

Judgment on award.

SEC. 14. Upon the return of the rule the court shall confirm the award and render judgment thereon, unless the award be vacated, or modified, or postponed, as herein provided, which judgment shall have the same force and effect as judgments in other cases.†

Service of the rule.

SEC. 15. If the rule has been served ten days or more on the adverse party before the time set for showing cause against the award, the court may proceed to examine and determine the same in his absence; or if he appear they shall proceed to hear and determine the grounds alleged against such award, if there be any.

Causes which may be shown against judgment on award.

SEC. 16. In all cases where an award or umpirage shall be presented to any court of record for a judgment to be entered thereon, whether the reference shall have been made by submission of parties as aforesaid, or by rule of

* An award should be recorded before rendition of judgment upon it, and a rule served on the defendant to show cause why the award should not be made the judgment of the court.—*Nelson* vs. *Hinsley*, 3 Blackf. 432.

Though the bond contain an agreement that the submission may be made a rule, the successful party may still sue on the award or bond.—*Dickerson* vs. *Tyner*, 4 Blackf. 253.

An action may be maintained by an executor or administrator on an award, though the matters submitted arose out of tort.—*Ibid.*

Parol evidence of an award cannot be given, without accounting for its absence.—*Burke* vs. *Voyles*, 5 Blackf. 190.

If in an agreement to submit to arbitration where no suit is pending, the parties do not stipulate that the submission shall be made a rule, the successful party cannot proceed under the statute on the award, but is left to his remedy at common law.—*Coffin* vs. *Woody*, 5 Blackf. 423.

On a trial of debt on award, when the plaintiff produced the submission and award, and also a record showing that, subsequently to the award, he had sued the defendant in assumpsit for the demands included in the submission, and that the defendant defeated the suit by relying on the submission and award, it was held that the defendant, under these circumstances, could not object to the suit on award on the ground that the agreement of submission was invalid.—*Stipp* vs. *W. H. Co.*, 5 Blackf. 473.

In an action where the replication protests against the submission and traverses the award, the submission is admitted.—*Stipp* vs. *W. H. Co.*, 5 Blackf. 16.

An award for a certain sum of money carries interest, by the statute of 1831, from the time the money was payable by the award.—*Hamilton* vs. *Wort*, 7 Blackf. 348.

If one of the holders of a joint promissory note, and one of the makers submit to arbitration the validity of the note as to such maker, and the award be that it is not, it will not bar a suit by all the holders against all the makers of the note.—*Woody et al.* vs. *Pickard*, 8 Blackf. 55.

To an action on an award, the defendant pleaded that there was no such award. *Held*, that the plea should be sworn to.—*Claypool* vs. *Miller*, 4 Blackf. 163.

†An award on which a justice of the peace has rendered judgment, may be impeached before the justice within ten days after judgment; or it may be impeached in the circuit court on appeal, though it was not objected to before the justice.—*Payne* vs. *Miller*, 6 Blackf. 178.

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court, the adverse party may show for cause against the rendition of said judgment any of the following grounds:

First. That such award or umpirage was obtained by fraud, corruption, partiality, or other undue means; or that there was evident partiality or corruption in the arbitrators or any of them.

Second. That the arbitrator or arbitrators [was or] were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence material and pertinent to the controversy, or any other misbehavior by which the rights of any party shall have been prejudiced.

Third. That the arbitrator or arbitrators exceed his or their powers, or that he or they so imperfectly executed them that a mutual, final, and definite award on the subject matter submitted was not made.*

Cases in which court may modify or correct award.

SEC. 17. Any party to such submission may move the court to modify or correct such award or umpirage in the following cases:

First. When there is an evident miscalculation of figures, or an evident mistake in the description of any person, thing, or property referred to or mentioned in such award or umpirage;

Second. When the arbitrator or arbitrators shall have awarded upon some matter not submitted, and not affecting the merits of the decision upon the matters which were submitted;

Third. When the award or umpirage shall be imperfect in some matter of form, not affecting the controversy, and

* An award is not conclusive as to the law and facts. A party has a right to prove in the circuit court any misconduct of the arbitrators or opposite party, or to show by the evidence before them that the arbitrators mistook the merits of the case.—*Hamilton* vs. *Wort*, 3 Blackf. 68.

The cause cannot be tried by a jury, unless the award be set aside for undue means.—*Rousan* vs. *Boffett et al.*, 3 Blackf. 141.

The record of a judgment on an award need not show that the arbitrators and witnesses were sworn, nor that the bond and award were proved.—*Jacobs* vs. *Moffatt*, 3 Blackf. 395.

An objection to an award on account of it not having been returned in time must be made in the court below.—*Ibid.* See also *Ellison* vs. *Chapman*, 7 Blackf. 224.

An award in the plaintiff's favor cures the same defects in the declaration, as would be cured by a verdict.—*Dickinson* vs. *Hays*, 4 Blackf. 44.

Awards before justices may be set aside in the circuit court for mistakes of arbitrators in matters of law, and such mistakes may be proven by extrinsic evidence.—*Claypool* vs. *Miller*, 4 Blackf. 163.

If a judgment be rendered on an award after rule, &c., a bill to set aside the judgment and award will not lie on the ground of fraud in obtaining the award, if, by due diligence, the party might have availed himself of the objection in answer to the rule, nor will it lie on the ground of newly discovered evidence, if, by proper diligence, the evidence might have been produced before the arbitrators.—*Elliott* vs. *Adams*, 8 Blackf. 103.

The misconduct of arbitrators is no defense in an action at common law on an award.—*Hough* vs. *Beard*, 8 Blackf. 158.

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when, if it had been a verdict, such defect could have been properly amended or disregarded by the court.*

Court to hear proof, may give judgment, or vacate award.

SEC. 18. The court shall hear the proofs and allegations of the parties, to invalidate and sustain such award or umpirage, and shall decide thereon, either confirming such award or umpirage, or may modify and correct the same in the cases prescribed in the last preceding section so as to effect the intent thereof, and to promote justice between the parties, and shall render judgment on such original or corrected award or umpirage; or the court may vacate such award or umpirage for any of the causes hereinbefore specified at the cost of the parties seeking to enforce such award or umpirage.

Judgment on award for money.

SEC. 19. If such award or umpirage be confirmed, judgment shall be given in favor of any party to whom any sum of money or damages shall have been awarded that he recover the same; and if the award or umpirage shall have ordered any act to be done by either party, judgment shall be entered that such act be done according to such award or umpirage.

Costs.

SEC. 20. The costs of the proceedings in court shall be taxed as in suits; and if no provision for the fees and expenses of the arbitration shall have been made in the award or umpirage, the court shall make the allowances therefor; but if there was a suit pending previous to such submission, the costs of which were not noticed by the arbitrators or umpire, the court shall not allow or tax any of the costs thereof prior to such submission.†

Court may enforce an award for performance of an act.

SEC. 21. When, by any judgment of the court on award or umpirage, any party shall be required to perform any act other than the payment of money, the court shall have power to enforce the same by attachment, until the terms of such judgment shall be complied with.

Referees.

SEC. 22. If the subject matter of any suit pending in any court, might originally have been submitted to arbitration, the parties to such suit, their agent or attorney at law may con-

* See 10 Wend. 589.

† The arbitrators should state in their award the costs of the witnesses examined before them, and the amount due for their own services. The award as to costs should distinctly show whether it applies to costs in the circuit court.—*Jacobs* vs. *Moffatt*, 3 Blackf. 395.

Though the agreement to submit be silent as to costs, the arbitrators may award costs of reference.—*Dickerson* vs. *Tyner*, 4 Blackf. 253.

If an award be silent as to costs, a judgment for them will be erroneous.—*Hamilton* vs. *Wort*, 7 Blackf. 348.

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sent, by rule of court, to refer the matter in controversy to certain persons mutually chosen by them in open court.*

Shall be sworn, investigate, and report.

SEC. 23. Such referees, if required by the parties, shall be sworn in open court or before any officer authorized to administer oaths, faithfully and impartially to investigate, adjust, and report the matters thus submitted, and shall proceed to the investigation of such matters according to the submission of the parties, and report to the court at such time as shall be agreed by the parties in such rule of reference.†

Report recorded and effect thereof.

SEC. 24. When such report shall be returned under the hands of the referees, or a majority of them, it shall be entered on the order book, and shall be of the same effect, and be deemed and taken to be as available in law as the verdict of a jury.

Judgment thereon.

SEC. 25. Either party may move the court for judgment on such report, and if no sufficient cause be shown to the contrary, judgment shall be rendered thereon in like manner and with like force and effect as if rendered upon the verdict of a jury.

Compensation.

SEC. 26. Such arbitrators and referees shall be allowed one dollar per day each, for every day they are necessarily employed as such arbitrators.

*See ante, p. 116, R. S. Vol. 2.

The arbitrators to whom a cause pending in the circuit court is referred, need not be sworn. In case of such reference, the award must be filed, approved by the court, recorded, and a *scire facias* be issued, &c., before the rendition of judgment.—*Dickerson* vs. *Hays*, 4 Blackf. 44.

If, when a suit is pending, the parties submit to arbitrators, he may not only have judgment on the award, but he may also sue on the award.—*Dickerson* vs. *Tyner*, 4 Blackf. 253.

If a suit pending in the circuit court, be referred to arbitrators, and the parties agree that the award shall be made the judgment of the court, judgment may be rendered on the award without a *scire facias*.—*Ellison* vs. *Chapman*, 7 Blackf. 224.

The "Code" changes the practice as recognized in the above decisions by abolishing writs of *scire facias*.

CHAPTER 4.

AN ACT regulating the granting of Divorces, nullification of Marriages, and decrees and orders of Court incident thereto.

[APPROVED MAY 13, 1852.]

What marriages shall be void. 2 Kent, 75. 2 Kent 76, 96.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, All marriages prohibited by law on account of consanguinity, affinity, difference of color, or where either party thereto has a former wife or husband living if solemn-

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ized within this State, shall be absolutely void without any legal proceedings.*

The issue of such marriage illegitimate.

SEC. 2. The issue of a marriage void on account of consanguinity, affinity or difference of color, shall be deemed to be illegitimate, and the father shall be liable to prosecution, as in other cases of bastardy.

When the issue is legitimate.

SEC. 3. When either of the parties to a marriage void because a former marriage exists undissolved, shall have contracted such void marriage in the reasonable belief that such disability did not exist; the issue of such marriage begotten before the discovery of such disability by such innocent party shall be deemed legitimate.

Proceedings to establish legitimacy.

SEC. 4. For the purposes of evidence, any person or persons interested in the question of such legitimacy may file their petition in the circuit court of any county in the State, where either of the parties to said marriage may reside; setting forth the facts, and making defendants thereto all persons interested in such question, and giving such notice to said defendant as is by this act required to be given to the defendant on a petition for divorce; and the court on hearing such petition, shall decree such issue to be legitimate or illegitimate, as the facts may be.

Decree conclusive.

SEC. 5. Such decree shall be conclusive between the parties thereto, and those claiming under them; but any minor defendant may have the same reviewed at any time within one year after arriving at the age of twenty-one years.

Divorces.

SEC. 6. Divorces may be decreed by the circuit courts of this State on petition filed by any person at the time a *bona fide* resident of the county in which the same is filed; of which *bona fide* residence the affidavit of such petitioner shall be *prima facie* evidence.†

Causes of divorce:

SEC. 7. Divorces shall be decreed upon the application of the injured party for the following causes:

Adultery.

First. Adultery, except as hereinafter provided.

Impotency.

Second. Impotency.

Abandonment.

Third. Abandonment for one year—or for a less period if the court shall be satisfied that reconciliation is improbable.

* See law regulating marriages, R. S. vol. 1, p. 361.

†The constitutional provision prohibiting laws impairing the obligation of contracts, does not extend to general laws authorizing divorces; provided the legislature, in the exercise of its power does not pass beyond the rights of its own citizens, and act upon the rights of citizens of other states.—*Tolen* vs. *Tolen* 2 Blackf. 407.

In a suit for a divorce, the *lex domicilii* is the rule of decision.—*Ibid.*

Petition by the wife for a divorce. The marriage was solemnized in Kentucky where the parties then resided. The husband there in 1822 or 1823, deserted his wife, and has ever since lived in adultery with another woman. Two or three years after the desertion, the wife removed to this State, where she has since that time resided. The husband was never resident here, and the notice to him of the pendency of the suit was by publication. *Held*, that the circuit court under the statute has jurisdiction of the cause.

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Divorces—causes—when not granted for adultery.

Fourth. Cruel treatment of either party by the other. Cruel treatment.

Fifth. Habitual drunkeness of either party, or the failure of the husband to make reasonable provisions for his family. Habitual drunkenness.

Sixth. The conviction subsequent to the marriage in any country of either party of an infamous crime. Infamous crime

Seventh. Any other cause for which the court shall deem it proper that a divorce should be granted.* Any other cause, &c.

SEC. 8. Divorces shall not be granted for adultery in any of the following cases: Divorces not to be granted for adultery in certain cases,

First. When the offense has been committed with the connivance of the party seeking the divorce.

Second. When the party seeking the divorce has voluntarily cohabited with the other, with knowledge of the fact; or has failed to file his or her petition for two years after he or she had discovered the same.†

Third. When the party seeking the divorce has also been guilty of adultery under such circumstances as would have entitled the opposite party, if innocent, to a decree.‡

SEC. 9. A petition for divorce, shall specify the causes therefor, with certainty to a common intent. Petition.

SEC. 10. The clerk of the court in which such petition is filed shall issue a summons for the defendant to appear and answer said petition; which summons shall be personally served on said defendant if a resident of the State, either by reading, or leaving a copy thereof at his or her usual place of residence. Subpœna.

* This seventh clause is constitutional.—*Ritter* vs. *Ritter*, 5 Blackf. 81.
This decision of the circuit court is subject to the revision of the supreme court.—*Ibid.*

† On the trial of a suit for divorce where the charge is adultery, the complainant may prove the offense, though he had known of its existence more than two years before the suit was instituted; and the defendant may prove the *scientur* in defence.—*McCafferty* vs. *McCafferty*, 8 Blackf. 218.
A husband cannot claim a divorce on account of the adultery of his wife, if he cohabit with her after his knowledge of the offense.—*Phillips* vs. *Phillips*, 4 Blackf. 111.
When a divorce has been granted on account of the misconduct of both parties, the wife cannot afterwards claim dower in the husband's lands under the R. S. 1843, p. 604, sec. 57.—*Cunningham* vs. *Cunningham*, 2 Carter's Ind. Rep. 233.
Condonation is a forgiveness by a husband of his wife, or by a wife of her husband, of adultery committed with an implied condition that the injury shall not be repeated, and that the other party shall be treated with conjugal kindness. It may be express or implied, as if a husband knowing of his wife's infidelity, cohabit with her.—5 Mass, 320, 69; 1 Johns, Ch. Rep. 488.
The effect of a condonation is removed by a repetition of the offense.—3 Eccl. Rep. 329. Where the parties have separate beds, there must, in order to found condonation, be something of matrimonial intercourse presumed, it does not rest merely on the wife's not withdrawing herself.—2 Paige Rep. 108.

‡ If the husband allege the adultery of the wife, and it be proved that after the offense complained of, he himself lived in adultery his application must fail. A petition for divorce should always state time and place of adultery, if that be charged.—*Christianberry* vs. *Christianberry*, 3 Blackf. 202.

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Notice to non-resident.

SEC. 11. If it shall appear by the affidavit of a disinterested person or by the return of the officer to whom such summons was directed, that the defendant is not a resident of this State, the clerk shall give notice of the pendency of such petition, by publication for three successive weeks in some weekly newspaper of general circulation, printed and published in such county; or, if there be no such paper, then in the one printed and published in this State nearest to the county seat of such county.

After 14 days' service, or 30 days' publication, court may hear, &c.

SEC. 12. The court may proceed to hear and determine such cause whenever such summons shall have been served fourteen days, or such publication made thirty days, before the first day of the term.

Proceedings on trial, &c.

SEC. 13. The defendant shall answer said petition under oath if required so to do by the petitioner; but no decree shall be rendered on default without proof; nor shall any admissions made in said answer be used as evidence in any other case against said defendant, nor shall the denial under oath by the defendant of the facts alleged in the petition render necessary any other or further proof by the complainant than would have been necessary if such denial had not been under oath.*

Cross-petition.

SEC. 14. The defendant may in addition to his or her answer, file a cross petition for divorce, and the court shall in such case decree the divorce, if any, in favor of the party legally entitled to the same.†

Witnesses and depositions.

SEC. 15. Witnesses may be examined in court, or depositions taken, at the option of the party offering the testimony.

Bill by wife, and evidence of chastity.

SEC. 16. A petition for divorce may be filed by the wife in her own name, and it shall be deemed sufficient evidence of good character if such petitioner shall satisfy the court or jury trying the same, that she had for two years previous to the filing of such petition, maintained a good reputation for chastity and virtue.

Interlocutory orders.

SEC. 17. Pending a petition for divorce, the court, or the judge thereof in vacation, may make, and by attachment en-

* The revised statutes of 1843 provided on page 602: "although the cause of divorce charged, be admitted by the opposite party, or the bill or answer in the nature of a cross-bill be taken as confessed, a decree of divorce shall not be rendered for such cause, without due proof thereof."

Upon this section the supreme court decided in 8 Blackf. 61, that there must be satisfactory proof independent of confessions. The present statutes, however, change the rule, confessions and admissions, evidently standing on the same footing as in other cases.

† In the case of a cross-bill by a wife against her husband for a divorce and alimony, the husband offered a witness whose competency was objected to because the husband had conveyed to the witness a tract of land, which it was alleged might be reached by the wife, if she should obtain alimony, and if the conveyance had been made to defraud her. Held, that the objection was untenable.—*McCafferty* vs. *McCafferty*, 8 Blackf. 218.

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force such orders for the disposition of the persons, property and children, of the parties as may be deemed right and proper, and such orders relative to the expenses of such suit as will insure to the wife an efficient preparation of her case and a fair and impartial trial thereof, and on decreeing a divorce in favor of the wife, or refusing one on the application of the husband, the court shall by order, to be enforced by attachment, require the husband to pay all reasonable expenses of the wife in the prosecution or defense of the petition when such divorce has been so granted or refused.

Rights of wife in case of misconduct of husband.

SEC. 18. A divorce granted for misconduct of the husband shall entitle the wife to the same rights so far as her real estate is concerned, that she would have been entitled to by his death. *

Alimony.

SEC. 19. The court shall make such other decree for alimony, as the circumstances of the case, the pecuniary condition of the parties, and the amount of personal property received by the husband from the wife's estate, shall render just and proper.

Rights of husband in case of wife's misconduct.

SEC. 20. A divorce decreed on account of the misconduct of the wife, shall entitle the husband to the same rights so far as his or her real estate is concerned, as he would have been entitled to by her death.

Children.

SEC. 21. The court in decreeing a divorce shall make provision for the guardianship, custody, and support and education of the minor children of such marriage.

Decree for alimony for a sum in gross.

SEC. 22. The decree for alimony to the wife shall be for a sum in gross, and not for annual payments; but the court in its discretion, may give a reasonable time for the payment thereof, by instalments, on sufficient surety being given. †

Effect of divorce.

SEC. 23. The divorce of one party shall fully dissolve the marriage contract as to both.

In another State.

SEC. 24. A divorce decreed in any other State by a court having jurisdiction thereof, shall have full effect in this State.

* See title "Descent," R. S. vol. 1, p. 251, 252.

A wife does not by obtaining a divorce on account of the misconduct of her husband become entitled to dower, under the act of 1843, in land aliened by her husband before the passage of the act.—*McCafferty* vs. *McCafferty*, 8 Blackf. 218.

† If a wife obtain a decree for divorce, and a certain sum as alimony, the decree is a lien on the real estate of the husband.—*Frakes* vs. *Brown*, 2 Blackf. 295.

If during the pendency of a petition for divorce and alimony, the husband convey his land away to defraud his wife of her right to support, the grantee receiving it with the same fraudulent intent, the conveyance is void as to the wife. During the pendency the court may make an order requiring the defendant not to dispose of his property; but the purchaser without notice of the order, will not be affected by it.—*Ibid.*

Also see *Fulk* vs. *Fulk*, 5 Blackf. 309, and 8 Blackf. 561.

In applications for dower or alimony, reputation is sufficient evidence of marriage, and there is no good reason why it should not be in petitions for divorce.—*Trimble* vs. *Trimble*, 2 Carter's Ind. Rep. 76.

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Certain marriages declared void, and the decree thereof.

SEC. 25. When either of the parties to a marriage shall be incapable from want of age or understanding of contracting such marriage, the same may be declared void on application of the incapable party, by any court having jurisdiction to decree divorces; but the children of such marriage begotten before the same is annulled shall be legitimate.*

Same.

SEC. 26. The same proceedings shall be had in such case as is provided in applications for divorce.

Pros. atty. to resist.

SEC. 27. Wherever a petition for divorce remains undefended, it shall be the duty of the prosecuting attorney to appear and resist such petition.

CHAPTER 5.

AN ACT authorizing Circuit Courts to change the names of persons and corporations.

[APPROVED JANUARY 21, 1852.]

Circuit courts may change names.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. The circuit courts in the several counties of this State, may change the names of persons and corporations on application by petition.

Where this application is to be made.

SEC. 2. The application of a person may be made to the circuit court of the county in which such person resides, and of a corporation to the circuit court of the county in which such corporation is situate, or in which its principal office is located.

Notice.

SEC. 3. Upon a petition being filed for such change, the applicant shall give notice thereof by three weekly publications in some newspaper of general circulation printed and published in the proper county, or if no newspaper be printed therein, in a newspaper printed and published nearest thereto in some adjoining county, thirty days prior to the first day of the term at which such petition shall be heard.

Proof of publication.

SEC. 4. Proof of the publication required in this act shall be made by filing a copy of such published notice, verified by the affidavit of a disinterested person, and when such proof of such publication is made, the court shall proceed to hear and determine said petition and make such order and decree therein as to such court shall seem just and reasonable.

Copy of decree evidence.

SEC. 5. A copy of the decree of such court, changing the name of any person or corporation, certified under the seal of such court, by the clerk thereof, shall be sufficient evidence of the name of such person or corporation, and of such change having been made in any court of this State.

* See p. 361, sec. 2, R. S. Vol. 1.

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Mortgages—how construed—preference of.

CHAPTER 6.

AN ACT concerning Mortgages.*

[APPROVED MAY 4, 1852.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana,* Unless a mortgage specially provide, that the mortgagee shall have possession of the mortgaged premises, he shall not be entitled to the same. Mortgagee not entitled to possession.

SEC. 2. No mortgage shall be construed as implying a covenant for the payment of the sum intended to be secured, so as to enable the mortgagee, his assignees, or representatives, to maintain an action for the recovery of such sum; and where there is no express covenant contained in the mortgage for such payment, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage.† Mortgage, how construed; remedies of mortgagee, how confined.

SEC. 3. No mortgage of real estate, or instrument operating as, or having the legal effect of, a mortgage hereafter executed shall authorize the mortgagee to sell the mortgaged premises, but every such sale shall be made under a judicial proceeding. Mortgage not to empower mortgagee to sell premises.

SEC. 4. A mortgage granted by a purchaser to secure purchase-money, shall have preference over a prior judgment against such purchaser. Mortgage to have preference.

SEC. 5. Every mortgagee of lands whose mortgage has been recorded, having received full payment of the sum or sums of money therein specified, from the mortgagor, shall at the request of such mortgagor, enter satisfaction on the margin or other proper place in the record of such mortgage, which shall operate as a complete release and discharge thereof. Mortgage being paid, mortgagee shall enter satisfaction on record.

SEC. 6. Where such mortgage has been paid and satisfied by the mortgagor, he may take a certificate thereof, duly acknowledged by the mortgagee, or his lawful agent, as herein required for the acknowledgment of conveyances to entitle the same to be recorded; which certificate and acknowledgment shall be recorded by the recorder in whose office such mortgage is recorded, with a reference to the book and page containing the record of the mortgage aforesaid; and such recorded certificate shall forever discharge and release the mortgagor from such mortgage, and forever bar all suits and actions thereon.‡ Mortgagor may have certificate of payment recorded.

SEC. 7. The recording of the assignment of a mortgage shall not be deemed, of itself, notice to a mortgagor, his heirs Recording of assignment not notice thereof;

*See ante, p. 176, R. S. vol. 2, title "Foreclosure of Mortgages."

†See R. S. Vol. 1, p. 234.

‡See R. S. Vol. I, p. 235, sec. 18, and p. 236, sec. 25.

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payment valid till notice is given.

or personal representatives, so as to invalidate any payment made by them to the mortgagee, or any assignee, before actual notice of such assignment.

This act not to affect foreclosures to the State

SEC. 8. Nothing in this act shall affect any provisions made by law, in relation to the foreclosure of mortgages to the State of Indiana, so far as the same conflict with the provisions of this act.

CHAPTER 7.

AN ACT concerning Liens of Mechanics, Merchants and others.

[APPROVED MAY 20, 1852.]

Mechanic may sell property,

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever any person shall entrust to any mechanic, or tradesman, materials to construct, alter, or repair any article of value, such mechanic, or tradesman, if the same be completed and not taken away, and his fair and reasonable charges not paid, may, after six months from the time such charges became due, sell the same; or, if the same be susceptible of division, without injury, he may sell so much thereof, as is necessary to pay such charges; and such sale shall be at public auction, for cash, or on reasonable credit, taking sufficient sureties in case of a sale on time.*

Notice of sale.

SEC. 2. Before such sale, such mechanic, or tradesman shall give public notice of the time and place thereof by advertisements set up for ten days in three public places in the city or township where he resides; one of which shall be in some conspicuous part of his shop, or place of business; or if the value of the article be ten dollars or more, then by publishing the same three weeks successively in a newspaper in the county, if any.

Proceeds, where deposited.

SEC. 3. The proceeds of such sale after payment of charges for construction, or repair, and for publication, and notice aforesaid, shall, if the owner be absent, be deposited with the treasurer of the proper county by the person making such sale, he taking the treasurer's receipt therefor; and shall be subject to the order of the person legally entitled thereto.

Provisions of this act to apply to property on which bailee has lien.

SEC. 4. The provisions of this act except those of the next section, shall apply to all cases of personal property on which

* See ante, p. 181 and 183, R. S. vol. 2.

A mechanic's lien for work done, is not waived by taking his employer's note for the money due for the work, and giving a receipt in full, for such money, the note not being paid. *Goble* vs. *Gale et al.*, 7 Blackf. 218.

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the bailee, or keeper, has by law, a lien for any feed or care by him bestowed on such property; *Provided*, that in cases where the person liable shall die before the expiration of six months from the time such charges had accrued, such sale shall not be made until the expiration of six months from the time of his decease. Proviso.

Sec. 5. In cases embraced in the last preceding section, if the property bailed, or kept, be horses, cattle, hogs, or other live stock, and in all cases embraced in this act, where the property is of a perishable nature, and will be greatly injured by delay, the person to whom such charges may be due, may, after the expiration of thirty days from the time when such charges shall have become due, proceed to dispose of so much of such property as may be necessary, as hereinbefore provided. If property bailed be live stock, &c., it may be sold after thirty days.

Sec. 6. Additional compensation for keeping and taking care of such property necessarily incurred, may be taken from the proceeds of sale as part of the charges. Additional compensation may be taken.

Sec. 7. Attested copies of the notices required by this act and proof of the publication thereof, and an affidavit of the mechanic, tradesman, or bailee, or some competent witness on his behalf, setting forth his claims, shall be filed and kept in the clerk's office of the proper county; and the same, or copies thereof, attested and sealed by such clerk, shall be received as testimony, and shall be presumptive evidence of the matters therein contained. Copy of notices, &c., to be filed; shall be evidence.

Sec. 8. Any forwarding and commission merchant having a lien upon goods which may have remained in store for one year or more, may proceed to advertise and sell at public auction so much thereof as may be necessary to pay the amount of the lien, and expenses, according to the previous provisions of this act.* Merchant having lien for storage may sell.

*If a person have a lien on goods for the price of hauling them to a place of deposit, his subsequently claiming them as his own, and refusing, on that ground, to deliver them to the owner, is a waiver of the lien. If A. deposit with B. a quantity of grain for safe keeping, and, at the time of making the deposit, borrow money and buy goods on credit of B. the law creates no lien for the debt on the grain, in the absence of an agreement, to that effect. *Picquet* vs. *McKay*, 2 Blackf. 465.

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CHAPTER 8.

AN ACT containing several provisions regarding landlords, tenants, lessors and lessees.

[APPROVED MAY 20, 1852.]

Tenancies at will, when determined.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That estates at will may be determined by one months' notice in writing delivered to the tenant.

Tenancies at will, and from year to year, how created.

SEC. 2. A tenancy at will cannot arise or be created without an express contract; and all general tenancies, in which the premises are occupied by the consent, either express or constructive, of the landlord, shall be deemed tenancies from year to year.

Notice.

SEC. 3. All tenancies from year to year, may be determined by at least three months' notice given to the tenant prior to the expiration of the year; and in all tenancies which, by agreement of the parties, express or implied, are from one period to another of less than three months' duration, a notice equal to the interval between such periods shall be sufficient.*

When ten days' notice sufficient

SEC. 4. If a tenant at will, or from year to year, or for a shorter period, neglect or refuse to pay rent when due, ten days' notice to quit shall determine the lease, unless such rent be paid at the expiration of said ten days.†

When no notice is necessary.

SEC. 5. Where the time for the determination of a tenancy is specified in the contract, or where a tenant at will commits waste, or in the case of a tenant at sufferance, and in any case where the relation of landlord and tenant does not exist, no notice to quit shall be necessary.

Service of notice.

SEC. 6. Notice, as required in the preceding sections, may be served on the tenant, or, if he cannot be found, by delivering the same to some person of proper age and discretion,

*Forms of notices to quit in case of a tenancy from year to year:

To A. B.—You are hereby notified to deliver up to me, at the expiration of the current year of the tenancy, the possession of the following described premises, [here describe them] now held by you, of me.

Sept. 20, 1852. C. D.

To A. B.—You are hereby notified to deliver up to me, at the expiration of three months from the time of receiving this notice, the possession of the following premises, [here describe them] now held by you, of me.

Sept. 20, 1852. C. D.

†Form of a ten days' notice:

To A. B.—You are hereby notified to deliver up to me, at the expiration of ten days from the time of receiving this notice, the possession of the following premises, [here describe them] now held of me by you as tenant, unless the rent due for said premises is paid within that time.

Sept. 20, 1852. C. D.

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residing on the premises, having first made known to such person the contents thereof.

Conveyance valid without attornment. But payment of rent, before notice, sufficient.

SEC. 7. A conveyance of real estate, or of any interest therein, by a landlord, shall be valid without the attornment of the tenant. But the payment of rent by the tenant to the grantor, at any time before notice of sale, given to said tenant, shall be good against the grantee.

Attornment without consent void.

SEC. 8. The attornment of a tenant to a stranger, shall be void, and shall not affect the possession of his landlord, unless it be made with the consent of the landlord, or pursuant to a judgment at law, or the order or decree of a court.

Sub-lessees.

SEC. 9. Sub-lessees shall have the same remedy upon the original covenant against the chief landlord, as they might have had against their immediate lessor.

Alienees.

SEC. 10. Alienees of lessors and lessees of land, shall have the same legal remedies in relation to such lands, as their principals.

Rents of grants for life.

SEC. 11. Rents from lands granted for life or lives may be recovered as other rents.

Rents dependant on the life of another.

SEC. 12. A person entitled to rents dependant on the life of another, may recover arrears unpaid at the death of that other.

Executors and administrators.

SEC. 13. Executors and administrators shall have the same remedies to recover rents, and be subject to the same liabilities to pay them as their testator and inestates.

Occupant liable.

SEC. 14. The occupant without special contract, of any lands, shall be liable for the rent, to any person entitled thereto.

Joint tenants, tenants in common and co-parcenary.

SEC. 15. If a joint tenant or a tenant in common, or tenant in co-parcenary have, by consent, management of the estate, and make with knowledge, and without objection of his co-tenant or co-parcener, useful or necessary improvements, the co-tenant or co-parcener shall contribute ratebly thereto.

A joint tenant, &c. may maintain action, &c.

SEC. 16. A joint tenant or tenant in common, or tenant in co-parcenary may maintain an action against his co-tenant or co-parcener, or their personal representatives for receiving more than his just proportion.

SEC. 17. Rents from lands are collected as other debts.

Remainders and reversions.

SEC. 18. A person seized of an estate in remainder or reversion may maintain an action for waste or trespass, for injury to the inheritance, notwithstanding an intervening estate for life or years.*

* The under-lessee of real estate has a right to pursue thereon anv lawful occupation he chooses, which is not prohibited by the lease to his lessor, nor by that to himself; and which is not injurious to the premises.—*Taylor* vs. *Owen et al.*, 2 Blackf. 30. Same point decided in *Taylor* vs. *Moffatt et al.*, 2 Blackf. 304.

A. leased to B., for a number of years, a dwelling house and two lots, at a certain annual rent, and covenanted in the lease to make some additions to the

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Landlord and tenant.

buildings, and to furnish some furniture for the house. The tenant entered into and occupied the premises, and the landlord sued for two years' rent. Held, that the landlord's not having made the additions, &c., agreed upon, was no bar to the action.— *Bryan* vs. *Fisher*, 3 Blackf. 316.

The day fixed in a lease under seal of real estate for years, on which the lessee is to have possession of the premises, is of the essence of the contract; and if the lessor refuse to give the lessee possession on that day, the latter may abandon the contract.—*Spencer* vs. *Burton*, 5 Blackf. 57.

Where land is leased for the purpose of raising thereon a single crop on shares, the lessor, if he is to receive his share of the crop situate on a designated part of the premises, has a right of entry on that part of the close on which his share is growing.— *Woodruff* vs. *Adams*, 5 Blackf. 317.

But where the lessor is to receive his share of the crop on other premises than those let, the tenant alone can maintain trespass for a breach of the demised premises, committed during the term.—*Ibid.*

In assumpsit on a verbal lease of certain land for a year, by which the defendant was to deliver to the plaintiff one-third of the crops raised, &c. Held, that in assessing damages in such case, the defendant might prove in mitigation thereof, that after the making of the lease, the plaintiff, with the defendant's consent, had leased a part of the premises to a third person, from whom he had received rent for that part.—*Ewing* vs. *Codding*, 5 Blackf. 433.

A person entered into possession of real estate under a parol contract, by which the lessee was to have a written lease for the premises for seven years, and was to make certain improvements thereon. After a part of the work had been done, and long before the expiration of the term, the lessor refused to execute the lease, and obliged the lessee to quit the premises. Held, that the lessor having rescinded the special contract, was liable to the lessee in *indebitatus assumpsit*, for the work performed.—*Alcorn* vs. *Harmonson*, 2 Blackf. 235.

The trustees of a town, by resolutions of the board, granted to A., his heirs, &c., the rights, &c., of certain real estate, for the purpose of opening a canal or building a mill of public utility thereon, annexing to the grant a condition that the improvements should be made within a certain time. For these privileges A. was to pay a certain per cent. on the proceeds of the improvement. A. assigned his interest to B. The legislature of the late territory afterwards, on the petition of B., and of some of the trustees individually, passed an act vesting the fee simple in the former, subject to the condition contained in the resolution. B. occupied the premises, erected thereon an expensive mill, and paid to the trustees the per cent. on the proceeds, in compliance with their demand. Ejectment by the lessee of the trustees. Held, that the legal effect of the resolutions of the board was not affected by the territorial statute passed on the petition of B. and of some of the trustees individually; the petition being of no consequence, and the legislature having no power to transfer, at pleasure, an estate not belonging to the territory. Held, also, that by their demand and receipt of the per cent. on the proceeds of the mill, the trustees admitted the improvements made to be conformable to the condition annexed to the resolutions; and that the moral policy of the law prohibited them from contending that their title did not authorize the grant. Held, also, that the resolutions, being neither deeds nor matters of record of a court of record, cannot operate as a freehold conveyance, either according to the common law or the statute of uses; that they constitute, the condition being performed, a lease for an indeterminate period, with a reservation of rent, and that the relation of landlord and tenant, which they create, prevents the occupant under them from disputing the title of the trustees. Held, also, that the interest granted to A. would have been formerly a tenancy at will, which his assignment would have determined; but that the old tenancies at will being generally superseded by tenancies from year to year which are assignable, his estate for no expressed period, with a reservation of rent, belonged to the latter class, and passed to B. by the assignment. Held, also, that before the trustees could recover in this action of ejectment, which treats the defendant as a trespasser, it was necessary for them to determine the tenancy, by giving to the proper person half a years' notice to quit, at that period of the year when the tenancy commenced.—*Jackson d. Bartholomew et al.* vs. *Hughes et al.*, 1 Blackf. 421.

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Personal property—accumulation of—suspension of ownership of.

CHAPTER 9.

AN ACT concerning the accumulation, suspension of ownership, and joint tenancy of Personal Property.

[APPROVED MAY 6, 1852.]

How long ownership may be suspended.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That no limitation or condition shall suspend the absolute ownership of personal property longer than till the termination of lives in being at the time of the execution of the instrument containing such limitation or condition; or, if in a will, of lives in being at the death of the testator.

Provision for the accumulation of interest, &c., when to be valid.

SEC. 2. A provision for the accumulation of interest or income of money or other personal property, by any conveyance or will, shall be void, except as follows:

First. If the accumulation be directed to commence from the date of the instrument, or the death of the person executing the same, it may be for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority.

Second. If the accumulation be directed to commence at any period subsequent to the death of the person executing such instrument, it may be within the time allowed in the first section of this act for the suspension of ownership, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority. But a provision for accumulation beyond the minority of such persons shall be void only as respects the time beyond such minority.

Minor may have allowance for support, &c.

SEC. 3. If a minor for whose benefit such accumulation may have been directed shall be destitute of means of support or of education, the proper court may, on complaint of such minor or of his guardian, cause a reasonable sum to be taken from such accumulation, for his support or education, or both.

Rights of survivor of persons holding in joint tenancy.

SEC. 4. The survivor of persons holding personal property in joint tenancy, shall have the same rights only as the survivor of tenants in common, unless otherwise expressed in the instrument.

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CHAPTER 10.

AN ACT providing for the settlement of Decedents' Estates, prescribing the rights, liabilities and duties of officers connected with the management thereof, and the Heirs thereto, and certain forms to be used in such settlement.

[APPROVED JUNE 17, 1852.]

LETTERS TESTAMENTARY AND OF ADMINISTRATION.

I.—*Letters Testamentary.*

Letters, when to issue. Who cannot qualify as executors.

SECTION 1. *Be it enacted by the General Assemby of the State of Indiana,* That after the expiration of ten days from the time when the existence of a will shall have been made known and it shall have been duly admitted to probate, the proper clerk shall issue letters testamentary thereon to the persons named therein as executors, who shall qualify, unless:

First. Except married women, they be incapable of making a contract;

Second. Be under the age of twenty-one years;

Third. Have been convicted of an infamous crime;

Fourth. Or shall be adjudged incompetent by reason of improvidence, habitual drunkenness, or other incapacity.

Married woman

SEC. 2. No married woman shall be entitled to letters testamentary, unless her husband file his consent thereto, in writing with the proper clerk, which consent shall make him, jointly with her, responsible for her acts in the premises.

Executor not named in letters has no authority.

SEC. 3. Every person named in the will as executor, who shall qualify and give bond, shall be named in such letters, and every person not thus named, shall be deemed superseded.*

To whom letters shall issue, in case executor refuse.

SEC. 4. Any person who is appointed executor, who shall renounce his trust in writing, filed with the clerk, or who shall fail to qualify and give bond within twenty days after probate of such will, shall be deemed to have renounced such

* In an action by two as executors, the defendant, after oyer of the probate, pleaded in abatement that one of the plaintiffs was not executor; the other only having proved the will and taken out letters testamentary. Held, that under the statute requiring security of executors, the plea was good.—*Call et al.* vs. *Ewing*, 1 Blackf. 301.

Executors must prove the will and take out letters testamentary before the filing of their declaration.—*Ibid.*

When there are two or more executors, each is liable only for the assets which come into his hands.—*Ibid.*

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appointment, and such letters shall issue to any other person named in the will, capable and willing to accept such trust. *

Power of executor before letters issue.

SEC. 5. No executor named in the will, shall interfere with the estate entrusted to him, further than to preserve the same, until the issuing of letters; but for that purpose he may prosecute any suit to prevent the loss of any part thereof.

II.—*Letters of Administration with the Will annexed.*

Letters with will annexed.

SEC. 6. If there be no person named in the will as executor, or if those named therein have failed to qualify, have renounced, or have been removed, letters of administration, with the will annexed, shall be granted by the proper clerk or court to any competent residuary legatee named in such will, willing to accept, or if there be none willing to accept, then to a competent specific legatee, or if there be none such willing to accept, then to any competent person, under the same regulations as in granting letters of administration in case of intestacy.

III.—*Letters of Administration.*

Letters of administration.

SEC. 7. After the expiration of fifteen days from the death of an intestate, the proper clerk or court having examined the person applying for letters, and such persons as may be deemed proper to be examined, under oath, touching the time and place of the death of the intestate, whether he left a will, and concerning the qualifications of such person, and there being no such will, shall grant letters of administration in their order: *first*, to the widow; *second*, to the next of kin; *third*, to the largest creditor residing in the State; and *fourth*, if no person thus entitled to administer shall apply within thirty days after the death of the intestate, the clerk or court shall appoint a competent inhabitant of the county, to whom the letters shall issue.†

In what county to be granted.

SEC. 8. Such letters shall be granted in the county;

First. Where at his death the intestate was an inhabitant;

Second. Where, not being an inhabitant of this State, he leaves assets;

* A person appointed an executor cannot have a right to the property of the testator, nor be liable to a suit for his debts, unless he accept the executorship. —*Calloway et al.* vs. *Doe d. Joyes*, 1 Blackf. 272.

† See *Mills* vs. *Carter et al.*, 8 Blackf. 203.
The granting of letters of administration is a judicial act, and when the court granting them has jurisdiction, individuals and courts of justice are bound to respect the authority of the letters, and to presume all things correctly done.—*Ray et ux.* vs. *Doughty et al.*, 4 Blackf. 115.

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Third. Where, not being an inhabitant and dying out of the State, he leaves assets;

Fourth. Where, not being an inhabitant, he dies out of the State, not leaving assets in any county thereof, but assets of such intestate shall afterwards come into it;

Fifth. But where, not being an inhabitant, he shall die out of the State, leaving assets in several counties, or assets of such intestate shall after his death come into several counties, letters may be granted in any one of the counties in which such assets may be, at the time of his death, or into which they may come thereafter; and the administration first lawfully granted, shall extend to all the estate of the intestate and exclude the jurisdiction of administration in the same estate in all other counties.

Who to have preference, &c.

SEC. 9. If several persons of the same degree of kindred are entitled to administration, letters may be granted to one or more of them; but males shall be preferred to females;—relatives of the whole blood to those of the half blood, and unmarried, to married women, and any other competent person may be associated in such administration, the person entitled thereto assenting. If a creditor apply for letters, he shall prove the amount of his debt by affidavit filed with the clerk, and if two or more creditors are equally entitled, the clerk or court shall decide who is to administer.

Who not entitled.

SEC. 10. No letters of administration shall be granted to any person incapable of serving as an executor, nor to any married woman; but when such woman shall be otherwise entitled to administer, letters may be granted to her husband.

Executor, &c., appointed in another State.

SEC. 11. If, before the granting of letters here, in case any person, not an inhabitant of the State, shall die, leaving assets therein, or assets shall come into it after his death, it shall appear that letters testamentary, or of administration with the will annexed, have been granted on such estate, by competent authority, in any other of the United States, then the person so appointed, on producing such letters, shall be entitled to letters, in preference to all other persons, except creditors and heirs of the intestate entitled to distribution, who are inhabitants of this State.

Husband alone entitled to administer on wife's estate.

SEC. 12. A husband, if otherwise competent, shall be solely entitled to administer on the estate of his wife, but shall be liable for her debts contracted before marriage, only to the extent of assets received from her. If he fail to administer, he shall be liable for her debts; and, if he die, her assets shall be subject to such debts; but if letters be granted to any other person by reason of the husband's incompetency, such person shall pay to the husband all the assets remaining after the payment of the wife's debts.

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Special letters—power of—executor *de son tort*—his liability.

IV.—*Special Letters of Administration.*

Special letters.

SEC. 13. If, from any cause, delay is necessarily occasioned in granting letters, or, if before the expiration of the time allowed by law for the issuing thereof, any competent person file his affidavit with the proper clerk or court, that any one is unlawfully intermeddling with the estate, or that there is no one having authority to take care of the same, such clerk or court shall issue special letters of administration to some competent person, to collect and preserve the property of the testator, or of the intestate, until demanded by an executor or administrator duly authorized to administer the same, when such special letters shall be deemed revoked.

Power of special admr.

SEC. 14. Such special administrator may prosecute suits to collect debts, secure the possession of, and preserve, the property of the decedent; and, under the direction of the court, may sell property of a perishable nature, after appraisement and notice given as in sales of personal property by an administrator.

V.—*Executor De Son Tort.*

Executor *de son tort*.

SEC. 15. Every person who shall unlawfully intermeddle with any of the property of a decedent, shall be chargeable as an executor of his own wrong, and shall be liable to an action in the court of common pleas, or any other court of competent jurisdiction, by any creditor or other person interested in the estate of the decedent, to the extent of the damages occasioned thereby, and shall account for the full value of such property, with ten per centum thereon, and may be examined under oath touching such intermeddling, and testimony thus elicited shall not be thereafter used against him in any prosecution; and such person may also be attached and imprisoned in the discretion of the court, until its orders in the premises are complied with; and no debt due such executor from the decedent, shall be deducted from the value of any such property.*

* If a widow continue in the possession of her deceased husband's goods and use them as her own, she is liable as an executrix *de son tort*.—*Hawkins* vs. *Johnson*, 4 Blackf. 21.

A person set out from this State to New Orleans on a trading voyage, leaving his wife and five small children in a destitute situation. His debts exceeded the value of his property, and he did not live to return home. Within a year after his departure and before his wife had any certain knowledge of his death, she had used the property left by him in the support of the family and in payment of his debts. Held, that, under these circumstances, the widow was not liable as an executrix *de son tort*, to the creditors of her husband.—*Brown* vs. *Benight et ux.*, 3 Blackf. 39.

The circumstance that a widow has possession of some goods of her deceased husband's estate, is not of itself sufficient to render her personally liable to a suit at law for a debt due from the estate, whether she hold the goods under a will of the deceased, or as executrix *de son tort*.—*Chandler et ux.* vs. *Davidson*, 6 Blackf. 367.

Nor is her parol promise in such case to pay the debt obligatory on her personally.—*Ibid.*

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VI.—*Administrator De Bonis Non.*

Admr. *de bonis non.*

SEC. 16. If any executor, administrator with the will annexed, or administrator, shall die, resign, remove from the State, or his authority be revoked, or superseded, the remaining executor or administrator shall complete the administration of the estate; but, if no such executor or administrator be remaining in the State, the proper clerk or court shall grant letters of administration, or of administration with the will annexed, to any person entitled thereto, under the same regulations as in case of issuing the original letters; and which administrator, or administrator with the will annexed, thus appointed *de bonis non*, shall have the same rights, and be subject to the same liabilities, as the executor or administrator first appointed.*

VII.—*Authority and evidence of Letters.*

Letters conclusive evidence.

SEC. 17. Such letters, issued from a court of competent jurisdiction, shall be conclusive evidence of the authority of

* The administrator of an administrator is not administrator of the first intestate, nor has he a right to administer any of the goods of the first intestate; but it is his duty to make settlement with the probate court, of the business done by the last intestate in his administration of the estate of the first intestate.—*Ray et ux.* vs. *Doughty et al.*, 4 Blackf 115.

If one of the co-administrators of an estate die, the administrator of the deceased is the proper person to pay any balance due to the estate from such co-administrator; and the surviving co-administrator is the proper person to receive it.—*Ibid.*

W. F., administrator of the estate of S., having committed waste, died, and M. F. administered on W. F.'s estate. M. F., R. G. F., and I. A. F., fraudulently appropriated the last named estate to their own use. The heirs at law of S. obtained a decree in chancery against M. F., R. G. F., and I. A. F., for said waste, &c. Held, that the administrator *de bonis non* of S., could neither sue in chancery for said waste, &c., nor enforce said decree.—*Ferguson et al.* vs. *Sweeny*, 6 Blackf. 547.

An administrator cannot be sued for the *devastavit* of his intestate, by an administrator *de bonis non* of the first intestate.—*Anthony* vs. *McCall*, 3 Blackf. 86

In an action by an administrator *de bonis non*, the declaration should state the name of the first administrator, and contain an averment of non-payment to him.—*Vanblaricum et al.* vs. *Yeo*, 2 Blackf. 322.

Assumpsit by an administrator *de bonis non*, on a promissory note payable to the former administrator. Plea, general issue, and judgment for the defendant. Held, that it will be presumed that, on the trial, the note was proved to be payable to the estate of the intestate.—*Williams et al.* vs. *Williams, Admr.*, 1 Carter's Ind. Rep. 450.

An administrator, having committed a *devastavit*, died, and his administrator was sued in chancery, by the administrator *de bonis non* of the first intestate, for such *devastavit*. Held, that the suit would not lie. Held, also, that under the statute, the administrator thus sued was liable for the *devastavit* to the creditors, &c., of the first intestate.—*Young* vs. *Kimball*, 8 Blackf. 167.

The executor of A. gave bond with surety conditioned for the performance of his duty. In 1846, and after the executor's death, the administratrix of the surety was sued, on said bond, for a *devastavit* committed by the executor. The suit was brought in the name of the State, on the relation of the administrator *de bonis non* of A. Held, that the suit would not lie on the relation of the administrator *de bonis non*.—*The State* vs. *Gooding*, 8 Blackf. 567.

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the person to whom they are granted, until superseded or revoked, and shall extend to all the decedent's estate. *

Transcript of record to be evidence.

SEC. 18. Such letters shall be recorded in a book provided for that purpose, by the clerk of the proper court of common pleas, which record, together with transcripts thereof, certified by the clerk, and attested by his official seal, shall be evidence in all courts, in the same manner as if the originals were produced.

GIVING BOND, AND QUALIFYING.

Giving bond and qualifying.

SEC. 19. Every person appointed executor, administrator with the will annexed, or administrator, before receiving letters, shall execute a separate bond, with sufficient resident freehold sureties, to be approved by the proper clerk or court, jointly and severally bound, in a penalty payable to the State of Indiana, of not less than double the value of the personal estate to be administered, and, in case real estate is to be sold by the terms of a will, also double the value of such real estate, conditioned that he will faithfully discharge his duties as such executor or administrator, and shall take and subscribe an oath or affirmation, that he will faithfully discharge the duties of his trust according to law, which oath or affirmation, attested by the clerk, shall be filed and recorded as part of the proceedings of the estate; and such clerk or court shall examine, under oath, such person, or any other person, touching the value of such personal estate, and, in case real estate is to be sold by the terms of a will, the value of such real estate; and shall also examine such sureties, under oath, as to the value of the property they own, more than their indebtedness; which oaths shall be taken and subscribed by such person or persons, and such sureties, respectively, and filed as a part of the proceedings in such estate.†

Court of com. pleas may supersede or confirm letters.

SEC. 20. Such clerk shall report to the court of common pleas, at its succeeding term, his acts in the premises, when for good cause shown, such court may supersede letters issued by such clerk, or disapprove of the bond taken, in which case such court shall grant letters to some other person entitled to the same, or require a new bond or additional sureties; but if no such cause is shown, the court shall ratify and adopt the letters and bond granted and taken by such clerk, which fact shall be entered in the order book of such court.

* See note to sec. 7 of this chap. p. 247.

† The statute requiring executors and administrators to give bond with surety, imposes on them no new duties; but it gives an additional remedy to creditors, legatees, &c. Hence, before judgment against an executor or administrator can be obtained, it must appear that he has committed some act or omitted some duty which would amount to a forfeiture of the conditions of his bond.—*Eaton* vs. *Benefield et al.*, 2 Blackf. 52.

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Executors and administrators—bonds to be filed—removal of—for what causes.

Bonds to be filed, &c.

SEC. 21. All bonds required by this act, shall be filed, recorded, and kept in the office of the clerk of the court of common pleas, where the same were taken and approved, and for this purpose a separate book shall be kept by such clerk.

REMOVAL OF EXECUTORS AND ADMINISTRATORS.

Causes of removal.

SEC. 22. On the written application, verified by oath, of any person interested in the estate, or of any co-executor, co-administrator, or surety of such executor or administrator specifying the grounds of complaint, any executor, administrator with the will annexed, or administrator may be removed, and his letters superseded by the court in which such letters issued for any of the following causes:

Habitual drunkenness, &c.

First. Where, from sickness, habitual drunkenness, imbecility, change of residence, actual or intended, or other cause, he is rendered incapable of discharging his trust to the interest of the State.

Failure to return sale bill, &c.

Second. When he shall fail to make and return inventories and sale bills, or to render account of his administration according to law or the order of the court, or shall waste, or fail to pay over, according to law, the money of such estate.

Insolvency.

Third. When it shall be shown to the court by his sureties, that such executor or administrator has become, or is likely to become insolvent, in consequence of which his sureties have suffered or will suffer loss.

Marriage.

Fourth. Where any administratrix or executrix at the time letters issued, was unmarried, and shall afterwards marry, and her husband shall fail to file his consent in open court, in writing, to her continuing as such.

Duty of admr. about removing from county, &c.

Fifth. But whenever an executor or administrator shall be about removing from the county in which he resided at the time he became such executor or administrator, he shall before leaving such county, make a true and final exhibit, under oath, to the court of common pleas, of the condition of the estate of which he is executor or administrator, at which time his letters of executorship or administration shall be revoked; and any executor or administrator who has, previous to the taking effect of this act, removed from the county in which he resided at the time he became such executor or administrator, and who has failed to make an exhibit as aforesaid, shall at the first term of the court of common pleas, after citation has been issued against him, be removed from all connection, as executor or administrator, with such estate; and it shall be the duty of the court of common pleas,

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at the first session thereof to issue a citation against such executor or administrator, commanding him to be and appear at the next term of said court, then and there to make a final settlement of said estate, at which time judgment shall be rendered against such executor or administrator for the amount found to be in his hands and due said estate: *Provided*, That the above provisions shall not apply to an administrator, who removes only into an adjoining county, but in that case, his letters may be revoked in the discretion of the court. Proviso.

Sixth. Where he shall fail to give additional bond and sureties, as required by the court; or, the court may without such application for any such causes, in cases of emergency, remove such executor, or administrator, instanter, without citation. Failure to give additional bond &c.

Sec. 23. On the filing of such application, or upon the order of the court, the clerk shall issue a citation to the person complained against, requiring him to appear and answer, which citation shall be served on him ten days before the hearing of the cause. Citation.

Sec. 24. If such executor is not a resident of the State, notice of the filing of such application shall be given three weeks successively in some newspaper published in the county where such application is filed; or if none is printed therein, then in some newspaper printed in this State nearest thereto. Notice to non-resident.

Sec. 25. At the term of the court next after notice has been given, the court shall proceed to hear the proofs and allegations of the parties; and upon such hearing, may examine such executor or administrator on oath. Hearing.

Sec. 26. If the determination of the court be against the application to remove, the costs of the proceedings may be taxed against the applicants; but if such determination be against such executor or administrator, he shall be removed, and his letters superseded immediately, or new or additional bond or surety be required, as the case may be, and the costs of the proceedings be taxed against him personally. Decision and costs.

Sec. 27. If new or additional bond, or other and additional sureties are required, two days' time shall be allowed therefor, when, if such order is not complied with, the court shall remove such executor or administrator, and supersede his letters. Time allowed for giving new bond.

Sec. 28. Whenever the ground of the complaint is that any executrix or administratrix, being an unmarried woman, has, since the granting of letters, married, the court shall not supersede such letters and remove her, if her husband will signify his assent in writing, filed in open court, to her con- Marriage of executrix.

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tinuing as such, and if she shall give further bond and surety to the satisfaction of the court, if such surety be required.

Release of surety.

SEC. 29. Any surety may apply to the proper court of common pleas to be released from his bond with such executor or administrator, by filing his request therefor with the clerk of such court, and giving ten days' notice thereof to such executor or administrator, when such court shall release such surety; and if such executor or administrator fail to give new bond or surety, as by it directed, he shall be removed, and his letters superseded; but such original surety shall not be released until such executor or administrator so gives bond, or is removed by the court; and such original surety shall be liable only for the acts of such executor or administrator from the time of the execution of the original to the filing of such new bond.

Penalty for intermeddling after removal.

SEC. 30. Whenever any executor or administrator is removed, and his letters are superseded, if he at any time afterwards unlawfully intermeddles with such estate, he shall be attached and imprisoned, not less than ten days, nor more than one month, by the proper court of common pleas, upon complaint of any one interested. *

Court to appoint a successor.

SEC. 31. Whenever any executor or administrator is so removed as aforesaid, all his power shall cease, and his acts as such be void; and the court shall appoint his successor, to whom letters *de bonis non* shall issue. †

Acts, when valid.

SEC. 32. All lawful acts done by executors or administrators whose authority shall cease, or by administrators before notice of a will duly proved, shall be valid.

NOTICE OF APPOINTMENT.

Notice of appointment.

SEC. 33. Every executor or administrator, within thirty days after his appointment, shall give notice thereof by publication three weeks successively in some newspaper printed and published in the county, if any there be, and if not, by

* The probate court, when satisfied that any removed executor or administrator has assets in his hands, can compel the payment or delivery thereof, by attachment or distress *infinite*; but such court is not authorized to make a compulsory order in favor of such removed administrator or executor against his successor for a balance due by the estate to the former.—*Kelly* vs *Weddle*, 1 Carter's Ind. Rep. 550.

† If a probate court revoke letters of administration, it must be presumed, till the contrary appear, that the same court had granted them.—*The State* vs. *Johnson et al.*, 7 Blackf. 529.

If an administrator be sued for a debt of the intestate, and, after the commencement of the suit, his letters of administration be revoked, he may plead such revocation in bar of the further maintenance of the action.—*Morrison* vs. *Cones*, 7 Blackf. 593.

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Executors and administrators—what articles inventoried and what omitted.

written notices set up in five of the most public places in the county, or by publishing the same in some newspaper printed and published nearest thereto, as the clerk or court may direct; and it shall be stated in such notice if the estate is probably solvent or insolvent.

INVENTORIES.

I.—*What Articles Inventoried.*

Inventory and appraisement.

SEC. 34. Such executor or administrator, within sixty days after his appointment, shall make out a full inventory of the personal estate of the deceased, which shall have come to h s knowledge, including all demands in favor of the estate, with a particular description thereof, and money belonging to such estate, and the emblements and annual crops, whether severed or not from the land, raised by labor, and cause the same to be appraised by two reputable householders of the neighborhood, who, before proceeding to the discharge of such duty, shall take and subscribe an oath that they will honestly appraise such estate, which oath shall be returned and filed with the inventory and appraisement thereof.

Appraisement.

SEC. 35. The appraisers shall, in the presence of each other, and of such executor or administrator, appraise each article, as specified in the inventory, at its true value, and set down opposite to each article respectively, the value in dollars and cents, in figures.

Articles omitted.

SEC. 36. Where a man having a family shall die, leaving a widow or minor child, the following articles shall be omitted in making the inventory, and shall not be considered as assets, viz:

First. All the articles of apparel and ornament of the widow and of the children of the deceased.

Second. The wearing apparel of the deceased, which shall be distributed at the discretion of the widow, or if there be no widow, in the discretion of the executor or administrator, among the nearest relatives, unless otherwise legally directed to be disposed of by the deceased.

Third. Bibles and school books used in the family of such deceased.

Fourth. All the provisions on hand, provided for consumption by the family.

When real estate to be included.

SEC. 37. When real estate is devised to executors, or directed by the will to be sold, for the payment of debts or legacies, the same shall be included in the inventory, and appraised at its true value by said appraisers.

When mortgaged premises shall be assets.

SEC. 38. When any mortgagee of real estate, or any assignee of such mortgagee, shall die without having foreclosed the equity of redemption, or received paymen. of the

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amount secured by such mortgage, the mortgaged premises, and the debt secured thereby, shall be considered as personal assets in the hands of his executor or administrator, and shall be administered and accounted for as such; and such executor or administrator shall have the same right to possession of the mortgaged premises, and to bring any suit respecting the same, or for the recovery of the debt secured thereby, and to execute or carry into effect any act, or power contained in such mortgage, or in the provisions of any law, as such mortgagee or assignee could if he were alive.*

Satisfaction of mortgage.

SEC. 39. When in any such case the mortgage is redeemed, or the debt secured thereby is paid, the money shall be received by the executor or administrator, and he shall thereupon release and discharge the mortgage.

When in possession executor, &c., to hold the premises in trust.

SEC. 40. If the mortgaged premises shall have been taken possession of under the mortgage, by the executor or administrator, or by the deceased, the executor or administrator shall hold the same in trust for the creditors, heirs or other persons entitled to the money upon the sale or redemption of the premises.

Any executor, &c., may make inventory.

SEC. 41. Any executor or administrator, on the failure of the others named in the same letters, may make and return such inventory and appraisement; and those so failing shall not afterwards interfere with the administration of the estate of the deceased, without the consent of the acting executor or administrator, or leave of the court.

Property specifically bequeathed.

SEC. 42. Property specifically bequeathed, may be delivered over to the legatee entitled thereto, he securing the redelivery thereof to the executor or administrator with the will annexed, on demand, if needed for the payment of debts against the estate, or for equalizing the legacies under such will, and that he will imdemnify him against any damage on account of the delivery of such property to such legatee.

Widow may select property to the value of $300.

SEC. 43. The widow, at any time before the return of such inventory, may select and take articles therein appraised, not exceeding [in value] three hundred dollars, for which she shall receipt to such executor or administrator; a statement of the

*Notes given to the husband for the purchase-money of the land of the wife, and secured by mortgage to him, become the property of the husband, and, when he dies, they pass to his administrator, though it was the intention of the wife that the proceeds of the land should be appropriated in a certain way for the benefit of herself and children.—*Talbott, adm'r.*, vs. *Dennis*, 1 Carter's Ind. Rep. 471.

In such case, an entry of satisfaction by the administrator of the deceased husband, of the decree of the foreclosure of the mortgage, in consideration that the mortgagor would convey the land to the wife, is a fraudulent violation of the administrator's duty, and the mortgagor and his grantees are parties to it, and it is void as to those who have an interest in the due administration of the estate.—*Ibid.*

The administrator can complain of such fraud, and, by bill, have such entry of satisfaction set aside, and the non-joinder of the representatives of the former administrator is not a fatal objection on the hearing or in error to this court.—*Ibid.*

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kind and amount of which goods so taken by the widow, shall be returned by such executor or administrator, with, and designated on, such inventory.

II.—*Return of Inventories.*

Return of inventory.

SEC. 44. Such inventory and appraisement, when completed, shall be signed by such appraisers, and such executor or administrator, and filed in the clerk's office of the proper court of common pleas, within thirty days thereafter.

Oath.

SEC. 45. Upon returning such inventory and appraisement, such executor or administrator shall take and subscribe an oath, endorsed on or annexed to such inventory, before such clerk, that the same is a true statement of all the personal estate of the deceased, which has come to his knowledge; and if the widow of such decedent shall have selected property, the amount thereof.

III.—*Additional Inventories.*

Separate inventories.

SEC. 46. When such estate is situated in places distant from each other, the executor or administrator may make, return, and file separate inventories and appraisements for each of said places, and shall have power to select different appraisers in each case, from the neighborhood in which such estate, or the greater part thereof, may be situate, to appraise the estate specified in any such inventories.

Additional inventories.

SEC. 47. Such executor or administrator shall make further inventories of the personal estate of such decedent, as the same may come to his knowledge, under the same regulations as provided in case of the first inventory.

SALE OF PERSONAL PROPERTY.

I.—*Public Sale.*

Public sale.

SEC. 48. Such executor or administrator, immediately after filing any such inventory and appraisement, shall proceed to sell, at public auction, the personal property of the deceased.

Notice of sale.

SEC. 49. Three weeks' previous notice of the time and place of such sale, shall be given by such executor or administrator, in some public newspaper printed and published in the county in which such sale is to be made, if any such newspaper is printed therein, and by setting up written or printed notices thereof, at three public places in the township in which such property is to be sold.

Credit.

SEC. 50. A credit of not less than three, nor more than twelve months, shall be given, in all such sales of personal pro-

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perty, by the executor or administrator, where the amount purchased exceeds three dollars; and notes waiving valuation and appraisement laws, and bearing interest from date, shall be taken in all sales of the personal estate of the deceased.

II.—*Sale of Annual Crops.*

Sale of crops.

SEC. 51. The executor or administrator may defer the sale of the annual crops, raised by labor, and which are not severed from the land at the time of such sale, beyond the time herein prescribed for the sale of the personal estate; and the same may be sold before or after they are severed from the land, in the mode prescribed for the sale of other personal property.

III.—*Sale of Written Contracts for performance, &c.*

Written contracts may be sold.

SEC. 52. Written contracts, except for the purchase of lands in the lifetime of the deceased, executed or transferred to him, obligating the person executing the same to the performance of anything whatever, other than to pay money, may be appraised and sold as personal estate of the deceased.

To be assigned.

SEC. 53. When such contract is so sold, the executor or administrator shall assign and deliver the same to the purchaser thereof without recourse.

Effect of assignment.

SEC. 54. Such assignment and delivery shall vest all the rights to enforce or dispose of such contract or agreement in such purchaser which would have vested in him if the deceased had made such assignment.

IV.—*Sale of Executory Contracts for purchase of Lands.*

Sale of contracts for purchase of land.

SEC. 55. If any such contract was for the purchase of land, and there are payments due, or to become due thereon, and the court is satisfied, upon such executor or administrator filing his petition therefor, verified by affidavit, that it would be more to the advantage of the persons interested in such estate, that the interest of the deceased therein, under such contract, should be sold, than that the assets in the hands of the executor or administrator should be applied to the payment of such purchase-money; or, that the assets are insufficient to pay the same; the court shall order the executor or administrator to dispose of the interest of the deceased therein, at public or private sale.

Notice, when to be given, &c.

SEC. 56. If such sale be ordered to be made by public outcry, notice thereof shall be given as in case of public sale of the personal property; but, if it is ordered to be private, no such notice shall be necessary; and, in such case, such contract shall not be sold for less than its appraised value; and a return

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of such sale, whether public or private, shall be made at the next term of such court, when it shall be confirmed, unless it shall appear to have been fraudulently made, or that a sum exceeding ten per centum on the amount bid can be obtained, in which case it shall be vacated, and a new sale ordered.

Sale to be made subject to all payments, &c. Purchaser to give bond.

SEC. 57. Such sale shall be made subject to all payments due or to become due, and shall not be confirmed by the court until the purchaser shall execute a bond to such executor or administrator, for his indemnity, and the indemnity of the persons entitled to the interest of the deceased in such land, in a penalty of double the whole amount of such payments, with condition that such purchaser will make all payments subject to which such sale has been made, and will fully indemnify the executors and administrators of the deceased, and the persons so entitled, against all demands by reason of any covenant or agreement contained in such contract so sold, or by reason of any other liability of the deceased, on account of the purchase of such land, and against all other covenants and agreements of the deceased with the vendor of such land, in relation thereto.

Court to direct assignment.

SEC. 58. When such sale shall be confirmed, the court shall direct the executor or administrator to execute an assignment of such contract to the purchaser, which assignment shall vest in such purchaser all the title of the persons having the right to the interest of the deceased in the land thus sold, at the time of sale; and such purchaser shall have the same remedies against the vendor of such land as the deceased would have had if he were living.

Part of land contracted for may be sold.

SEC. 59. If, in the opinion of the court of common pleas, a part of such land may be sold advantageously to the estate of the deceased, so that the moneys arising from such part will pay the amount of the purchase-money due or to become due therefor, such court may order a part only of such land to be sold; and in that case the purchaser need not execute bond as hereinbefore required.

V.—*Private Sales.*

Private sale.

SEC. 60. Whenever the court of common pleas shall be satisfied that it would be for the advantage of such estate to sell any part of the personal property thereof at private sale, such court may authorize the executor or administrator to thus sell the same; but such property shall in no case be sold for less than its appraised value: nor shall such executor or administrator become the purchaser thereof; and a return of such sale shall be made within the time prescribed by the court, not to extend beyond three months; and bond, with approved surety, shall be taken for the purchase-money, as in case of public sales.

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VI.—*Making and Returning Sale Bills.*

Sale bill.

SEC. 61. An account of such public sales of the personal estate shall be kept by some clerk selected by the executor or administrator, and not interested in such estate, nor of kin to such executor or administrator; and such account shall specify the time and place of sale, the different articles sold, price thereof, by whom purchased, and the names of the sureties; which account, sworn to and subscribed by such clerk, before any officer authorized to administer oaths, shall be returned by such executor or administrator within thirty days after such sale, and filed in the office of the clerk of the proper court, to be preserved as evidence of the sale of the property therein specified.

SETTLEMENT OF DEBTS, PAYMENT OF LEGACIES, AND SALES OF REAL ESTATE, WHEN THE PERSONAL IS INSUFFCIENT.

I.—*Filing Claims.*

Filing claims.

SEC. 62. A succinct statement of the nature and amount of every claim, whether due or not, against the estate of any decedent, except judgments which are liens upon the decedents' real estate, and mortgages of his real or personal estate obtained and executed in his life time, and expenses of administration, must be filed in the office of the clerk of the proper court of common pleas, within one year from the date of the first appointment of an executor or administrator therein, and notice thereof; or no cost shall be recovered therein against such executor or administrator; nor shall hereafter any other court have original jurisdiction of any claim, except such liens against the estate of any decedent; and, if such claim be not due, interest thereon shall be rebated, and after the expiration of one year from such appointment and notice, if such claim be not filed at least thirty days before final settlement of the estate, it shall be barred, except as hereinafter provided in case of the liabilities of heirs and devisees.

Claims not due.

SEC. 63. If any person interested in such estate, shall execute bond with penalty and surety to the acceptance of a creditor, whose claim is not due, for the payment thereof when it shall fall due, if the same shall prove to be a legal demand, the court, on such bond being delivered and accepted and a statement thereof subscribed by such creditor, filed in such court, shall direct a minute thereof to be made on its order book, and the estate of the deceased to be discharged from further liability touching it.

Claimant may maintain suit.

SEC. 64. If such person fail to pay such claim when it shall be due, such creditor may maintain suit on such bond, and the persons executing the same may show any matter of valid defense.

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Executors and administrators—allowance of claims—effect thereof.

II.—*Notice of Claims.*

Notice of claims.

SEC. 65. The clerk of the proper court shall make out a list of all claims filed against any estate, and at the next term of such court thereafter, shall present the same to the executor or administrator thereof, when further proceedings shall be continued to the ensuing term of such court, unless upon the application of such executor or administrator therefor, trial thereof is directed to be had at such first term by such court; but if such executor or administrator be not present at such first term, such clerk shall transmit to such executor or administrator such list, by mail or otherwise, if his residence be known, and if his residence be unknown, and such list be not so presented to him, such claim shall be disposed of at the ensuing term, as if he were present.

III.—*Allowance of Claims.*

Allowance of claims.

SEC. 66. Such list shall be spread upon the appearance docket of such court, in the order in which the claims are filed, and whether such executor or administrator appear or not, shall stand for trial in that order at the second term after they are filed; and such trial shall, in all respects, be governed by the rules regulating the trials of similar actions in the circuit court, except that such administrator or executor, and, in the discretion of the court, the claimant may be examined under oath, touching such claim; but no claim except for services as executor or administrator, shall be allowed unless proven by other testimony than that of the claimant; and all matters of valid defense, except a set-off, may be given in evidence without any special plea; but no execution shall at any time issue upon such allowance, nor shall any claim be allowed after final settlement; but such allowance shall have th e same force in any court of competent jurisdiction in any suit thereafter instituted touching it, and may be given in evidence in the same manner as regular judgments at law. *

* If in assumpsit against an administrator on the intestate's promise, the defendant plead the general issue and *plene administravit*, and the jury find for the plaintiff, the verdict should state the amount of assets in the hands of the administrator unadministered.—*Gaston* vs. *Hiatt*, 5 Blackf. 44.

A replication to a plea of *plene administravit* as to the goods of the testator, that the testator, at the time of his death, was seized of real estate which the defendant, if necessary, could have reduced to assets for the payment of debts, is bad on general demurrer.—*Joiner* vs. *Sanders*, 5 Blackf. 378.

Debt by an executor on a promise by the defendant to the testator to pay the latter a certain sum *per annum* for rent during his (the testator's) lifetime. Held, that proof of the defendant's promise, and of his payment of one year's rent, without any evidence as to the time when the testator died, did not sustain the action.—*Ellis* vs. *Ford*, 5 Blackf. 554.

A bill was drawn on an administrator payable out of a particular fund. The administrator promised the holder that if he would retain the bill, it should be paid whenever a certain farm should be sold. Held, that as the consideration

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Order of allowance.

SEC. 67. If, after the hearing of the proofs and allegations on the trial of any claim against an estate, the court be satisfied that it is valid and just, the court shall order it to be allowed, which order shall be entered on the proper record of such court, bear interest from that time until paid, and have the full force of a regular judgment in any court, except as herein provided.

Defense.

SEC. 68. Such executor or administrator shall attend and make all necessary defense against such claimants and when any demand shall be due the estate from the claimant, he shall file a statement thereof upon the trial of such claim, which shall be all the plea of set-off required; and if he fails so to attend in person or by agent, he shall be liable on his bond for whatever damage the estate or person interested therein may sustain thereby.

Claim for expenses of administration.

SEC. 69. If such claim be for expenses of administration, the court may allow it, or so much as may be deemed just, after examining under oath such executor or admisistrator touching such claim, upon his applying and producing proper vouchers therefor.

Joint contract.

SEC. 70. When two or more persons are bound in any joint contract, or in a judgment founded thereon, and either of them shall die, the proportionable part of such contract may be allowed against his estate, except where the relation of principal and surety exists, and in that case, if the decedent be the principal, the whole of such contract shall be allowed against such estate.

IV.—*Collection of debts due the Estate.*

Compounding with debtor.

SEC. 71. Such court may direct such executor or administrator to compound with any debtor, or to buy in property at sales under execution in favor of the estate, where the interest thereof may be promoted by so doing, which prop-

of the promise arose subsequently to the intestate's death, no action would lie against the administrator on the promise, so as to charge the estate of the intestate.—*Mills et al* vs. *Kuykendall*, 2 Blackf. 47.

If an administrator suffer judgment by default, he cannot afterwards, by the common law, in an action against him suggesting a *devastavit* plead *plene administravit*.—*Moore* vs. *Martindale*, 2 Blackf. 353.

Debt by A. against B., administrator of C., on a bond of the intestate for 860 dollars. Damages, 100 dollars. Pleas, *non est factum* and *plene administravit*. Verdict for the debt, and 481 dollars and 60 cents damages; in all, 1,341 dollars and 60 cents. Judgment for the same, *de bonis propriis*, with costs. Held, that the judgment is erroneous: 1st, because it is *de bonis propriis*; and, 2ndly, because it is for a greater sum than is laid in the declaration.—*Johnson* vs. *Hawkins*, 2 Blackf. 459.

If the plaintiff confess the plea of *plene administravit*, a judgment in his favor should be of assets *quando acciderint*.—*Wilt* vs. *Bird*, 7 Blackf. 258.

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erty shall be disposed of in the same manner as personal property of the decedent. *

* The acts of one of several administrators are deemed to be the acts of all and are valid, in respect to the administration.—*Herald* vs. *Harper et al.*, 8 Blackf. 170.

A., B. and C. were D.'s administrators. C., D. and E. were partners in trade when D. died. A. and B. as two of the administrators, of the one part, and C., in his individual capacity, of the other, settled the partnership business, and found there was due from C. to D.'s estate a certain sum, for which C. gave his note to A. and B. as administrators. Held, that the note was founded on a sufficient consideration and was valid.—*Ibid.*

If a promissory note be made payable to A., executor of B., and be delivered to A. as such executor, the latter may sue on it in his representative capacity. —*Sheets* vs. *Pabody*, 6 Blackf. 120.

And if A. renounce the executorship without having sued on the note, the administrator *de bonis non* of B. may sue on it.—*Ibid.*

An executor can sue in his own right on a judgment obtained by him as executor for a debt due to his testator.—*Campbell et al.* vs. *Baldwin*, 6 Blackf. 364.

The general issue, &c., in a suit by an administrator, admits the representative character of the plaintiff.—*Lowe* vs. *Bowman*, 5 Blackf. 410.

Ne unques administrator may be pleaded in bar of an action brought by an administrator for a cause of action which accrued in the lifetime of the intestate.—*Codding* vs. *Whitaker*, 5 Blackf. 470.

If two partners be indebted for goods sold and delivered, and one die in the lifetime of the other, the administrator of the deceased partner may, by statute, be sued at law for the debt.—*Ransom* vs. *Pomeroy*, 5 Blackf. 383.

A bill in chancery, filed by an administrator on a cause of action which accrued to the intestate in his life-time, was dismissed upon the merits. Held, that the defendant was not entitled to a decree for costs.—*Cooper* vs. *Thatcher et al.*, 3 Blackf. 59.

Debt on an executor's bond against the administrators of the surety. The declaration did not aver that the relators were entitled to recover as heirs, legatees, or creditors of the testator, nor that assets subject to the claim had come to the hands of the executor; but it is stated, that a decree had been recovered by the relators in a suit against the executor. Pleas, performance by the executor, *plene administravit* by him, &c. Issues on the pleas, and verdict for the plaintiff. Held, also, that the decree referred to in the declaration, without record of the previous proceedings, was not admissible as evidence, and *semble*, that independently of that objection, the decree was inadmissible. —*Nicholson et ux.* vs. *Carr et al.*, 3 Blackf. 104.

If an executor or administrator, necessarily suing in his representative character, suffer a non-suit in consequence of an illegal instruction, given by the court to the jury against his right to recover, he is not liable for costs out of his own goods.—*Pollard* vs. *Buttery*, 3 Blackf. 239.

A note payable to A., administrator of B., is due to A., in his own right, and he may sue on it without naming himself administrator.—*Barnes* vs. *Modisett et al.*, 3 Blackf. 253.

If in such case the suit be in the name of A., administrator of B., the words "administrator of B." may be considered as surplusage.—*Ibid.*

If an administrator change the nature of the debt, originally due to the intestate, by a contract made with himself, he must sue for the new debt in his own name, and not in his representative character.—*Helm* vs. *Van Vleet*, 1 Blackf. 342.

If the plaintiff declare on a promise made to himself, and take judgment in his own name, his styling himself administrator in the declaration may be considered as only *descriptio personæ*.—*Ibid.*

An administrator-plaintiff, necessarily suing in his representative character, as on a contract entered into with the intestate, pays no costs though he fail in the suit.—*Harrison* vs. *Warner*, 1 Blackf. 385.

If, however, he might have sued in his own name, as on a contract made with himself, or for trover and conversion of the goods of the estate in his own time, he must pay costs in case of failure.—*Ibid.*

So, though he necessarily sues as administrator, he is liable for costs when

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Executors and administrators—debts due estate—petition to sell lands, &c.

Proceedings against person suspected of concealing goods.

SEC. 72. Upon complaint made to the court of common pleas by any executor or administrator under oath against any one suspected and believed to have concealed, converted or conveyed away any of the goods of the deceased, such court may cite such person to appear before it, and to be examined on oath upon the matter of such complaint; and if the person thus cited shall refuse to appear and to answer such interrogatories as shall be lawfully propounded to him, the court may commit such person, upon order of attachment, to the jail of the county until the interrogatories propounded by the court shall be answered on oath; and all such interrogatories, and the answers thereto, shall be in writing, and signed by the party examined, and filed in such court of common pleas.

Desperate claims.

SEC. 73. The court may discharge such executor or administrator from the collection of any debt due the estate, where the interests of such estate are likely to be injured by an attempt to collect; and any creditor, legatee or distributee whose claim or interest is unpaid, upon filing a bond with sureties to be approved by such executor or administrator, payable to the State of Indiana, in a penalty double the amount of such claim, conditioned for the faithful payment into court, of all sums by him collected on such claim, may receive the same, and maintain suit thereupon in the name of such executor or administrator, who shall not be liable for any costs thereon.

Disposition thereof.

Suit on bond, when.

SEC. 74. If the person suing on such claim, fail to account therefor, when required by the proper court of common pleas he and his sureties may be sued on such bond, at the instance of any person interested therein, in the name and for the use of such person; and all money collected on such bond shall be paid into such court, and disposed of in the same manner as the personal estate of the decedent, such person being allowed a reasonable compensation for his services in making such collection.

V.—*Petition to sell Lands to pay Debts.*

Petition to sell land.

SEC. 75. Whenever any executor or administrator shall discover that the personal estate of the decedent is insufficient to pay the liabilities thereof, the court having jurisdiction shall order to be sold the whole or any part of the real estate of the deceased, upon such executor or administrator

he knowingly brings a wrong action, is guilty of willful default, fails to prosecute his suit, or sues on a contract which he knows to be annulled.– *Ibid.*

An executor can maintain a suit on notes and mortgages given to the testator, and which were by him specifically bequeathed.—*Crist* vs. *Crist*, 1 Carter's Ind. Rep. 570.

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filing a petition therefor, either in vacation or during term time setting forth: *

First. The amount of personal property which has come to his hands;

Second. The amount of the debts outstanding against the estate of the deceased, so far as the same can be ascertained, and the insufficiency of the personal estate to pay the same;

Third. A description of the real estate of the deceased, liable to be made assets for the payment of his debts, or so much thereof as the executor or administrator may deem it necessary to sell; the title which the deceased had therein at his death; and, if the same was inventoried and appraised with the personal property, the amount of such appraisement, and if not, the probable value thereof;

Fourth. The names and ages of the heirs, legatees, or devisees, if any, of the deceased; or, if they are unknown, the fact shall be so stated.

Fifth. Such clauses in the will, if there be any, as require a specific distribution of the personal, making it necessary to sell the real estate to pay such liabilities.

VI.—*Notice of Petition.*

Notice of petition.

SEC. 76. No order to sell such real estate shall be made until a notice of the time and place of hearing such petition shall have been given by three successive publications in a newspaper printed in the county, or if there be none printed therein, in a newspaper nearest thereto, in this State, thirty days before the hearing of such petition, and by posting up written or printed notices thereof in three public places in the township where such real estate is situate.†

Notice, when not required.

SEC. 77. Whenever any of the persons interested in such real estate are of lawful age, and shall signify in writing their assent to such sale, the notice required by this section may be dispensed with as to such persons, and if such persons be minors, and their guardians give such assent, such notice shall not be required.

* The petition of an administrator to the probate court, for an order to sell the real estate of the intestate to pay debts, need not contain a particular description of each of the debts; a statement in such case of the aggregate amount of the debts being sufficient.—*Collins* vs. *Farnsworth et al.*, 8 Blackf. 575.

† The real estate of a decedent was sold by the order of a court of competent jurisdiction, on application of the administrators (there being two of them,) for the payment of debts, the report of the sale confirmed, and a conveyance to the purchaser ordered to be executed. Held, that the circumstance, that notice of the application was served only on the general guardian of the intestate's heirs, they being minors, and that the sale was reported to the court by one of the administrators as having been made by him, did not show the sale to be void.—*Doe d. Hawkins* vs. *Harvey*, 5 Blackf. 487.

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Creditor, when to have order for sale.

SEC. 78. Any creditor, upon filing a petition therefor, verified by his affidavit, setting forth the amount of the personal estate, the insufficiency of such personal estate to pay the debts outstanding, a description of the real estate of the decedent, the names and ages of the heirs and legatees, if they be known, and, if not known, so stating, may have an order for the sale of such real estate by such executor or administrator, under the same regulations as hereinbefore provided in case of an application to sell real estate by an executor or administrator; notice of the filing of such petition being given to the executor or administrator ten days before the time at which such petition stands for hearing.

VII.—*Appraisement of Real Estate.*

Appraisement.

SEC. 79. If an inventory and appraisement of the real estate, or any part thereof, described in said petition, shall not have been made and returned, such executor or administrator, before the court shall proceed to hear such petition, shall make an inventory of said real estate, and cause the same to be appraised in the manner prescribed for the appraisement of personal estate, and shall file such inventory and appraisement in the office of the clerk of such court; and such court may, from time to time, order a re-appraisement of such real estate, if it be satisfied that it has been appraised at too low or too high a rate.

VIII.—*Appointment of Guardian ad Litem.*

Guardian ad litem.

SEC. 80. If it shall appear that any of the heirs or devisees of the deceased are minors, the court, before hearing the petition, shall appoint a *guardian ad litem* for such minors; and if their interests require active opposition, the court may allow attorney's fees to such guardian.

IX.—*Order of Sale.*

Order.

SEC. 81. Such executor, administrator or creditor, upon the hearing of such petition, may be examined under oath, witnesses be compelled to attend and testify, and depositions be taken touching the same, under the usual regulations of law; and if the facts set forth in the petition appear to be true, the court shall grant an order empowering such executor or administrator to sell the whole or so much of such real estate as is necessary to pay such debts, as the interest of the estate may require; and may, from time to time, order a residue remaining unsold, to be sold for a like purpose, under the same regulations as in case of the first sale, except that no petition need be filed, and notice of the filing thereof given; but the

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Executors and administrators—sale of land to pay debts—bond—terms.

same may be ordered to be sold upon the court being satisfied, upon the application of the executor or administrator, that such sale is necessary for the payment of debts.*

Bond.

SEC. 82. Previous to the making of an order for any such sale, the executor or administrator shall file in the office of such court a bond, payable to the State of Indiana, in a penalty not less than double the appraised value of the real estate to be sold, with sufficient freehold sureties, to be approved by the court, and conditioned for the faithful discharge of his trusts according to law.

Terms of sale.

SEC. 83. The court ordering such sale shall specify in such order the terms of sale; but no credit shall be directed to be given for more than eighteen months.

What real estate may be sold.

SEC. 84. The real estate liable to be sold for the payment of debts, when the personal estate shall be insufficient therefor, shall include:

First. All the real estate held or possessed by the deceased at the time of his death, by legal or equitable title, except such as was held upon a contract for the purchase of land, and all interests in real estate which would descend to his heirs.

Second. All school or other lands held on a certificate of purchase of the General Government or the State of Indiana.

Third. All lands, and any interest therein, which the deceased in his lifetime may have transferred, with intent to defraud his creditors.

Lands fraudulently conveyed.

SEC. 85. But lands thus fraudulently conveyed shall not be taken from any one who may have purchased them for a valuable consideration, and without knowledge of the fraud; but such lands shall be liable to be sold only in cases in which they would have been liable to attachment and execution by a creditor of the deceased in his lifetime; and no proceeding

*On the petition of an administrator for the sale of real estate for the payment of debts, the court should not order the sale of more than is sufficient for the payment of the debts, unless the residue of the land would be greatly injured by such sale.—*Black et al.* vs. *Meek, Admr.*, 1 Carter's Ind. Rep. 180.

At the May term, 1838, an administrator filed a petition for an order of sale of real estate of the intestate for the payment of debts. Afterwards, at the same term, an inventory, &c. having been filed by the administrator, the court, on motion, appointed a *guardian ad litem*, for the heirs of the intestate, they being infants. The guardian filed an answer for the infants, admitting the allegations in the petition. Afterwards, at the same term, the court, on petition of the administrator, authorized him to sell the premises at private sale. At the August term, 1838, the administrator made a report, stating that he had sold the premises; and the court confirmed the sale. In March, 1840, the administrator executed a conveyance of the premises to the purchaser. Held, that the order of sale was erroneous, but that it was not a nullity; and that the purchase under it was valid.—*Thompson* vs. *Doe d. Hare et al.*, 8 Blackf. 336.

Proceedings in the probate court ordering an administrator to sell the real estate of the intestate, to pay the debts of the estate, there not being sufficient personal estate from which to liquidate them, cannot be impeached collaterally.—*Williams adm'r.* vs. *Sharp adm'r.*, 2 Carter's Ind. Rep. 101.

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by any executor or administrator to sell any lands so fraudulently conveyed, shall be maintained, unless the same shall be instituted within five years after the death of the testator or intestate.

Possession thereof.

SEC. 86. If the executor or administrator shall be authorized to sell any lands thus fraudulently conveyed, he may, before sale, obtain possession by an action for the possession thereof; or may file a petition to avoid the fraudulent conveyance.

X.—*Sale of Real Estate.*

Notice of sale.

SEC. 87. Such executor or administrator shall proceed to make such sale, having first given four weeks' public notice of the time, place, and terms thereof, in some public newspaper, if there be one published in the county where such real estate is situate, and by setting up notices thereof, at not less than five public places in the county, three of which shall be in the township in which such real estate is situate; or if situate in more than one township of such county, three notices as aforesaid shall be set up in each of such townships. *

Manner of sale.

SEC. 88. Every such sale shall be at public auction, and for not less than two-thirds of the appraised value of such real estate, unless in the opinion of the court, it would benefit the estate of the deceased to sell the whole or any part of such real estate at private sale; in which case the court, if the same is asked for in the petition, may order and direct such real estate, or any part thereof, to be thus sold by the execu-

* A sale of a decedent's real estate under proceedings of the probate court, to which proceedings the heirs were not parties, does not divest the title of the heirs.—*Sherry et al.* vs. *Denn d. State Bank*, 8 Blackf. 542.

If an administrator consent to the sale, by heirs, of the real estate of the intestate, he divests himself of any right, which he might otherwise have had under the statute, to make such estate assets, in case of a deficiency of the personal property.—*Pell* vs. *Farquar*, 3 Blackf. 331.

If an administrator, authorized by an order of court to sell, at public sale, the real estate of his intestate for the payment of debts, purchase the land himself at the sale; and, afterwards, sell it at an advanced price; he is liable to account to the heirs, for whose benefit the administrator's purchase must be considered to have been made. And the effect is the same, whether the purchase be made by the administrator alone, or jointly with another; or whether it be made in person or by an agent.—*Brackenridge* vs. *Holland et al.*, 2 Blackf. 377.

If, owing to the conduct of the administrator, any uncertainty exist as to the amount of the profits made by him on the purchase, he will be chargeable with the largest amount which, from the circumstances, he can be presumed to have realized.—*Ibid.*

Heirs to whom land has descended, and which has been sold by order of court, may have the administrator's sale to himself set aside by application in a reasonable time, upon the payment of the purchase-money and the value of the improvements.—*Shaw et al.* vs. *Swift*, 1 Carter's Ind. Rep. 565.

When any portion of the land of a deceased debtor has been sold and converted into assets by his executor or administrator for the payment of debts, under an order of court, no other land of the estate can be ordered to be sold on the application of creditors, until the assets so obtained as aforesaid have been exhausted.—*Brown et al.* vs. *Rose et al.*, 6 Blackf. 69.

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tor or administrator; but the same shall not be thus sold for less than the appraised value, nor until after notice of the terms of the sale given as the court may direct; nor shall such executor or administrator become the purchaser.

Where there are liens.

SEC. 89. Whenever any executor or administrator shall sell any lands, or interest therein, subject to any lien or charge thereon, or any land held by the deceased at his death, by virtue of any contract subject to any condition, such executor or administrator may take a bond of the purchaser thereof, with sufficient sureties, conditioned that such purchaser will make all payments and indemnify the said executors and administrators, and all persons interested in the estate of the deceased, against all liabilities of the deceased, on account of such land; but the court may make an order for the sale of any real estate of the decedent, or any interest which he may have had therein, for the payment of the purchase-money or valid lien thereon.

May be sold for purchase-money, or lien.

XI.—*Mortgage and Lease of Real Estate.*

Court may authorize mortgage, &c., instead of sale.

SEC. 90. Instead of ordering the sale of such real estate, the court may authorize the executor or administrator to mortgage or lease such real estate, or any part thereof, for any period not longer than five years, if it shall appear that the money necessary to be raised can be procured thereby, to the interest of the estate.

Effect of mortgage.

SEC. 91. A lease or mortgage, executed by the executor or administrator, under the authority of the court, shall be as valid as if executed by the deceased in his lifetime, but before the court shall make any order to authorize an executor or administrator to execute such lease or mortgage, he shall execute bond in a like manner, as is required previous to making an order for the sale of real estate.

Bond.

XII.—*Sale of Real Estate Devised.*

Real estate devised, &c., to be sold.

SEC. 92. When real estate or any interest therein is devised by the will, or directed to be sold for the payment of debts or legacies, the executor shall proceed to dispose of the estate and apply the same according to the provisions of the will. *

* An executor derives his power over the real estate of the testator from the will, and acts as the trustee of the testator to fulfil a personal trust. The authority of an administrator with the will annexed, emanates from, and depends upon legislative enactments. A power to executors to sell lands situate in Ohio, given by a will made in Virginia, could not be executed by an administrator with the will annexed, appointed in Virginia under their laws, in the absence of any statute of the State of Ohio authorizing the execution of such power by such an administrator.— *Willis* vs. *Cooper et al.*, 2 Ohio Rep. 124; S. C. 3 O. R. 488; *Henry et al.* vs. *Doctor et al.*, 9 O. R. 49. See also *Naylor* vs. *Moody et al.*, 2 Blackf. 247, and S. C. 3 Blackf. 92.

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Sale by one of two or more executors, when valid.

SEC. 93. When any real estate, or any interest therein, is given or devised by any will legally executed, to the executors therein named, or any of them, to be sold by them, or any of them; or where such estate is ordered by any will to be sold by the executors, and any executor or executors shall neglect or refuse to take upon him or them the execution of such will; then all sales made by the executor or executors, who shall take upon him or them the execution of such will, shall be equally valid as if the other executor or executors had joined in such sale.

Sale, how conducted.

SEC. 94. Sales of such real estate, as to giving notice, conveying, taking notes and mortgages, return and confirmation, or vacation, shall be conducted in like manner as herein provided in relation to sales by an administrator for the payment of debts, unless by the terms of the will different directions are given; but no petition, or notice of the filing thereof, shall be required.

XIII.—*Sales of Real Estate by Foreign Executors.*

Foreign executors.

SEC. 95. When any executor shall be appointed without, and there shall be no executor within, this State, the testator not having been at the time of his death an inhabitant thereof, the executor so appointed may file an authenticated copy of his appointment in the court of common pleas of any county in which there may be real estate of the deceased, after which he may be authorized by such court to sell real estate for the payment of debts or legacies, in the same manner, and upon the same terms as in the case of an executor appointed in this State, except as hereinafter provided.

Bond.

SEC. 96. Whenever it shall appear to the court that such foreign executor is bound with sufficient su reties in the State or country in which he was appointed, to account for the proceeds of such sale for the payment of debts or legacies, and a copy of such bond, duly authenticated, shall be filed in such court, no further bond shall be required of him here; if, however, he is not thus sufficiently bound, he shall give bond in said court, as is required of executors appointed in this State.

Court where letters filed to have jurisdiction.

SEC. 97. All proceedings by a foreign executor in respect to the sale of land, shall be had in the court in which such authenticated copy of his appointment is first filed; and such court shall have exclusive jurisdiction to direct the sale of any lands of the testator situated in any county in this State.

XIV.—*Taking Notes and executing Certificates of Sale.*

Notes &c.

SEC. 98. Upon such sale being made such executor or

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administrator shall take from the purchaser promissory notes for the purchase-money, with sufficient surety, waiving recourse to the valuation or appraisement laws of this State; and shall also execute to such purchaser a certificate of the sale of such real estate.

SEC. 99. Such notes shall be drawn according to the terms of the sale prescribed by the court, and shall bear interest from date. How drawn.

XV.—*Return and confirmation of Sale.*

SEC. 100. Such executor or administrator shall make return under oath, of his proceedings in the premises, at the next term after such sale, to the court granting the order; and if such court be satisfied therewith, it shall confirm the same, and direct such executor or administrator, to execute a conveyance or assignment to such purchaser of such lands, setting forth the name of such executor or administrator, the heirs or devisees mentioned in the petition, the time of filing thereof, in substance the order of the court directing the sale, the description of the premises sold, and the name of such purchaser or his assignee; but, upon the delivery of such conveyance or assignment to such purchaser or his assignee, he shall execute and deliver to such executor or administrator a mortgage upon such premises, according to the terms of the sale, the expense of making which mortgage and the recording thereof, shall be paid by such purchaser or his assignee, which said mortgage, such executor or administrator shall cause to be recorded forthwith in the proper record of deeds of such county, and such certificate of sale, upon the delivery of such conveyance, shall be handed over to such executor or administrator; and such notes shall be retained by him if the same are approved by the court. Return, confirmation, conveyance.

SEC. 101. But if such court shall be satisfied that such proceedings were unfair, or that the sum for which the real estate, or any part thereof, was sold, is greatly disproportioned to the real value thereof, or that a sum exceeding such sum at least ten per cent., exclusive of the expense of such sale, can be obtained therefor, the court may vacate such sale, in whole or in part; or, if it shall appear that the sureties taken on the notes for the purchase-money are insufficient, such sale shall not be confirmed until additional surety, to the satisfaction of the court, is given; and if such purchaser fail to give such surety within the time required by the court, the sale, as to such purchaser, shall be vacated. When court may vacate sale.

SEC. 102. When any such sale, in whole or in part, shall be vacated, the court shall direct another sale to be made, Re sale.

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under the same regulations governing the first order and sale, as to the real estate necessary to re-expose to sale.

XVI.—*Accounting for Sale.*

Accounting for sale.

SEC. 103. The court granting the order for the mortgage, lease or sale of such real estate, shall possess the same power to compel such executor or administrator to account for the proceeds thereof as in case of personal estate.

XVII.—*Bond given to pay Liabilities, &c.*

Bond to pay liabilities, &c.

SEC. 104. An order for the sale, lease or mortgage of such real estate shall not be granted, if any of the persons interested in such estate shall give bond to the executor or administrator, in a sum, and with sureties to be approved by the court, conditioned to pay all liabilities eventually due from the estate, with charges of administration, so far as the personal estate is insufficient.

XVIII.—*Paying Money into Court.*

Report and payment of money into court.

SEC. 105. At the next term of the court of common pleas after the receipt of any money of the estate of a decedent, the executor or administrator thereof shall make a report of the same to said court, accompanied with a brief statement, verified by oath, setting forth the names of the persons from whom it was received, the nature of the demand therefor, and that no other money belonging to such estate, not before reported, has been received by him, which statement shall be filed among the papers belonging to said estate; and whenever the amount of money so reported exceeds fifty dollars, the court shall order it to be paid into court, unless the executor or administrator shall show by proper vouchers that he has paid it out upon valid claims against the estate allowed by the court, or upon such preference claims as he is permitted by law to pay off, without the same being allowed by the court; and the court may order such money so paid in, to be loaned out for a period not exceeding one year from the first issuing of letters, under such regulations as it may deem advantageous to the interests of the estate.

Proceedings against executor, &c., for failure to report.

SEC. 106. If such executor or administrator fail to make such report according to the provisions of the preceding section, the court shall forthwith issue a citation against him, and if he fail to appear and report as aforesaid, at the next term after the issuing of such citation, it shall be the duty of said court to remove him instanter, and appoint an adminis-

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trator *de bonis non*, who shall immediately bring suit on such executor's or administrator's bond.

Damages. SEC. 107. In any suit, as provided for in the preceding section, if the plaintiff recover, he shall have damages for the amount of money of such estate not paid over, with interest from the time when it was received, and ten per centum thereon.

XIX.—*Payment of Debts.*

Payment of debts. SEC. 108. No claim against such estate except judgments which are liens upon the decedent's real estate, and mortgages of real and personal property existing in the lifetime of the decedent, and the expenses of administration, funeral expenses, and expenses of last sickness, shall be paid until the expiration of one year from the first issuing of letters thereon, unless it shall appear to the proper court that the money belonging to such estate, in the hands of the executor or administrator, or paid into court, is sufficient to pay all claims up to that time allowed against the same, and that such estate is clearly solvent.

XX.—*Order of Payment.*

Order of payment. SEC. 109. All claims against the estate of a decedent, shall be paid in the following order:

First. Expenses of administration;

Second. Expenses of last sickness, and funeral expenses;

Third. Judgments which are liens upon the decedent's real estate, and mortgages of real and personal property existing in his life time;

Fourth. General debts;

Fifth. To legatees;

Sixth. To distributees.

The court in its discretion, may order the administrator or executor, to pay the money in his hands into court, and the same to be paid out on such claims by the clerk; or it may direct the administrator or executor to pay it out directly, and, in the payment of such claims, no preference shall be given to any claim of the same class, nor shall any executor or administrator, as such, be liable for any claim, he being alone responsible on his bond for any breach of his trust.

[XXI.—*Possession, Rents and Profits of Real Estate.*]

When executor, &c., may take possession of real estate. SEC. 110. If there be no heir or devisee of a testator or intestate present at the death of the decedent to take possession of the real estate left by any such testator or intestate, the executor or administrator of his personal estate may, as

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trustee for the proper heirs or devisees, take possession of such real estate, and demand and receive the rents and profits arising therefrom, and sue for and recover the same, and do all other acts relating to such real estate, which may be for the benefit of the persons entitled thereto, and consistent with their rights and interests, until the settlement of such estate, and until the court make further order in the premises.

He shall account for rents, &c.

SEC. 111. Such executor or administrator shall account to such court for any rents or profits or use of such premises which he shall have received, and the same may be applied to the payment of the debts of the decedent, after the personal property shall have been exhausted.

XXII.—*Final Settlement.*

Final settlement.

SEC. 112. At the end of one year from the first issuing of letters thereon, the executor or administrator, of every estate shall make an exhibit of all his proceedings in the premises and the clerk of the proper court shall present a brief statement of all payments, if any, he may have made on claims against the deceased; both statements to be accompanied with proper vouchers, and if there be sufficient money on hand, the court shall order the payment of the claims against the estate, and unless there be claims in favor of such estate uncollected or undisposed of according to law, shall order entered a final settlement, if there be pending no claims against such estate not allowed and filed according to law; and if there be such thus pending, the settlement of such estate shall be continued until such time as the court may direct; and if such estate be solvent, and there be not enough money to pay the claims against it, but real or personal estate or uncollected claims belonging thereto, undisposed of, such court shall order the money on hand, to be paid on the claims against the estate, according to the order herein provided, *pro rata*, among the claims of each class, and continue such final settlement until such time as the court may deem necessary; and the court may, from time to time, continue the final settlement of such estate as the interests thereof may require.*

Claims may be assigned to creditors.

SEC. 113. If at the time of the final settlement of any estate, there be any claims due such estate uncollected, and not money enough on hand to pay all the creditors, if any such creditors whose claim does not exceed the amount of such claim, will accept it in discharge of so much of their

* The final settlement of the accounts of executors and administrators in the probate court, is considered *prima facie* correct; and the settlement can only be interfered with in very clear cases of fraud or mistake. — *Ray et ux.* vs. *Doughty et al.*, 4 Blackf. 115.

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claims, it shall be delivered or assigned to them by the executor or administrator, and such estate shall be finally settled.

Or to heirs.

SEC. 114. If at the time of final settlement, all the claims against such estate, except legacies, be paid, and there remains due such estate any uncollected claim, if any legatee or heir whose share does not exceed the amount thereof will accept it in payment of so much of his share, the same shall be assigned or delived to him by the executor or administrator, and the estate shall be finally settled.

Bond for payment of unallowed claim.

SEC. 115. If at the time of final settlement of such estate any claim is pending against it unallowed, and the creditors, legatees, or heirs will execute to the approval of the claimant bond with penalty and surety, to pay the amount of his claim, if it be allowed, such estate shall be finally settled.

Executor, &c., when to be discharged.

SEC. 116. After the debts and legacies of an estate and charges of administration are paid, and all claims in favor of such estate are disposed of according to law, the executor or administrator shall be discharged from the further administration thereof, and no final settlement shall be revoked or re-opened, except by appeal to the circuit court, and the same shall there appear to have been illegally made: *Provided however*, That any person interested in said estate so settled, may have said settlement set aside for mistake or fraud, at any time within three years after said settlement, and if such person be under any legal disabilities at the time of said settlement, then within three years after the removal of such disability.

Proviso.

XXIII.—*Settlement in Vacation.*

Settlement in vacation.

SEC. 117. Executors, administrators and guardians may at any time, in vacation, present their accounts current and vouchers for examination to the clerk of the court of common pleas, who shall upon such examination file the same, and report such account current and vouchers to the said court at its next term for settlement.*

Notice.

SEC. 118. The clerk of such court shall give public notice of the time when such accounts current will be presented to the court for examination and settlement, which notice shall be published ten days before each term of such court, in a newspaper printed in such county, if any there be; if not, by posting such notice upon the court house door, and upon the office door of such clerk.

XXIV.—*Payment of Legacies, &c.*

Application for allowance of legacy.

SEC. 119. Any person entitled to any legacy, or to a distributive share of the estate of any deceased person at any

* See R. S. Vol. 2, ante, p. 21, Sec. 33.

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time previous to the settlement of such estate, may apply to such court, either in person or by guardian, after giving reasonable notice to the executor or administrator, to be allowed to receive a portion of such legacy or distributive share for his support.*

Advancement of part of legacy.

SEC. 120. If it appear to the court that there is at least one-third more of assets in the hands of such executor or administrator or in court than will be sufficient to pay all debts and legacies against the estate then known, such court may in its discretion, allow such portion of such legacy or distributive share to be advanced, as may be necessary and proper for the support of the person entitled thereto, upon satisfactory bond being executed to such executor or administrator, with sufficient penalty and surety for the return of such portion with interest, whenever necessary for the payment of debts, legacies or claims, or to equalize the shares and legacies among those entitled thereto.

When specific and general legacies shall be paid.

SEC. 121. After the expiration of one year from the granting of letters, the executor or administrator may discharge the specific legacies, and pay the general legacies bequeathed by any will, if there be sufficient assets; and if there shall not be sufficient assets to pay the general legacies, then an abatement thereof shall be made, in proportion to the amount of each.

Guardian may receive minor's legacy.

SEC. 122. In case any legatee is a minor, his legacy, if so directed by the court, and no other provision for the payment thereof is made by the will, may be paid to the guardian of such minor; and such court may require an additional bond of such guardian, if the amount of such legacy was not taken into consideration at the time he gave bond as such guardian.

SETTLEMENT OF INSOLVENT ESTATES.

I.—*Petition of Insolvency.*

Petition of insolvency.

SEC. 123. Whenever it shall appear to the proper court that any estate is probably insolvent, by the petition of the executor or administrator, or creditor, verified by affidavit thereto attached, setting forth the amount of the claims outstanding against the estate, so far as the same can be ascertained, the description of the real estate, if any, the probable

* A legatee, whether general or specific, must obtain the executor's assent to the legacy, before his title to the legacy can be complete and perfect; and if the legatee take possession of the thing bequeathed without such assent, the executor may maintain trespass or trover against him.—*Crist* vs. *Crist*, 1 Carter's Ind. Rep. 570.

If the executor refuse his assent, without cause, to a legacy, the legatee is entitled to relief in equity.—*Ibid.*

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value of the real and personal estate, and the supposed deficiency, such court shall order such estate to be settled as an insolvent estate.*

Where real estate belongs to insolvent estate

SEC. 124. If there be real estate belonging to such insolvent estate, like notice shall be given as is required in case of a petition to sell real estate for the payment of debts; and, on the hearing thereof, the court may examine under oath such executor or administrator, or other persons touching the same, provided that such petition may be filed and notice given in vacation.

II.—*Notice of Insolvency.*

Notice of insolvency.

SEC. 125. If such estate be declared probably insolvent, such executor or administrator shall publish a notice in a newspaper printed and published in the county, if one is printed therein, and by written notices posted up in three public places in the county, that such estate has been declared insolvent, and will be settled accordingly.

Executor, &c., to show that notice has been given.

SEC. 126. At the term of the court next after making publication of such notice, the executor or administrator shall show to the court that such publication has been made as required.

III.—*Sale of Insolvents' Real Estate.*

Sale of insolvent's real estate.

SEC. 127. Upon the entering of an order to settle an estate as insolvent, all the real estate of the decedent remaining unsold, and subject to be sold according to the provisions of this act, shall be ordered to be sold under the same regulations, as to the additional bond required of the executor or administrator, notice of sale, conveying to purchaser, taking bonds and mortgages, return, confirmation and vacation of sale, as govern the sale of real estate to pay debts, the personal being insufficient therefor. †

* An action cannot be brought against an administrator on a promise of the intestate (the administrator not having been guilty of fraud, waste or negligence,) after a complaint had been filed in the probate court by the administrator, for the purpose of settling the estate as insolvent. — *Renny* vs. *Butler*, 7 Blackf. 5.

After a judgment had been obtained in the probate court against an administrator, and an execution awarded and issued against the real estate of the deceased, the administrator filed a complaint, under the statute, for the purpose of settling the estate as insolvent. Held, that, on motion of the administrator, the execution should be set aside. Held, also, that the lien of the judgment was destroyed by the filing of the complaint.—*Joyce et al.* vs. *Hufford et al.*, 7 Blackf. 382.

An administrator in the case of an appeal from a judgment against his intestate, executed an appeal-bond. The appellee obtained a judgment on the appeal, to be levied of the intestate's goods. In an action on the appeal-bond, the defendant proved that the estate, at the time of the judgment on the appeal, was insolvent. Held, that the plaintiff could not recover.—*Evans* vs. *Adams et al.*, 4 Blackf. 54.

† See ante, p. 264, R. S. vol. 2.

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Where order for sale has been made before petition of insolvency.

SEC. 128. If an order for the sale of such real estate has been obtained previous to the filing of a petition of insolvency, but has not been carried into effect, it shall be prosecuted to completion by such executor or administrator, under the same regulations as provided in the preceding section.*

IV.—*Payment of Claims.*

Payment of claims.

SEC. 129. If such estate be declared insolvent before the expiration of one year from the first issuing of the letters thereon, no claim against it, except expenses of administration and of last sickness, shall be paid until the expiration of such year, and the court shall order the loaning of the money thereof as hereinbefore provided; and at the expiration of such year, if all the estate of the deceased be converted into money, and there be no claims unallowed pending against it, the court shall direct a distribution of the money of such estate among the claimants whose claims have been allowed, in the order hereinbefore provided, *pro rata*, among the claimants of each class; but if the property covered by liens, as mentioned in the third class, has been sold subject thereto, that class shall be omitted in such distribution.

Where claim is pending unallowed.

SEC. 130. If, at the time of such distribution, a claim be pending against such estate, unallowed, and such estate shall have been converted into money, such court shall order distribution as aforesaid, reserving enough of such money to pay the *pro rata* share of such claim in the event it be allowed, and shall continue final settlement of the estate until the ensuing term, and from time to time, until such claim is finally disposed of, unless the other creditors shall execute to such claimant a bond with approved surety for the payment of his *pro rata* share, if such claim be finally allowed, in which case such estate shall be finally settled.

When claim in favor of estate is not collected.

SEC. 131. If at the time of such distribution there remain any claim in favor of the estate uncollected, the settlement of such estate shall be continued as provided in the preceding section, unless such claim be reported as desperate, or any creditor whose distributive share would not exceed the amount thereof, shall accept it in discharge of so much of his claim, in which case the estate shall be finally settled, and the executor or administrator discharged from his trust.

Decedent's surety, how secured

SEC. 132. If any surety of a decedent is likely to become liable on account of his principal, for the payment of money in damages or otherwise, but which liability has not accrued at the time of final settlement of such decedent's estate, such surety shall file a statement of such liability in the proper court of common pleas, where the *pro rata* share of such surety in the event his claim were allowed, shall be reserved out of

* See ante, p. 264, R. S. vol. 2.

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the distribution, and the final settlement of such estate continued until such claim is disposed of, unless the other creditors shall execute a bond to him, with sufficient penalty and surety to be approved by him, conditioned that they will pay the *pro rata* share of such claim in the event it be allowed, in which case such estate shall be finally settled.

DISPOSITION OF ESTATES NOT WORTH OVER THREE HUNDRED DOLLARS.

Petition, appraisement, &c

SEC. 133. If the widow of a decedent, or any one in her behalf, shall file a petition in the proper clerk's office of the court of common pleas, that the estate of such decedent, real and personal, is not worth over three hundred dollars, such clerk shall select one disinterested householder of the county, and such widow on her part another, as appraisers, who shall proceed to inventory and appraise each solvent demand due the deceased, and each article of personal, and each tract of real estate, which inventory and appraisement they shall return to such clerk's office, when such clerk shall cause them to take and subscribe an oath that such appraisement is a true valuation of all the personal and real estate of the decedent exhibited to them.

Estate to be delivered to widow.

SEC. 134. Upon the return of such inventory, if the value of such estate does not exceed three hundred dollars, such clerk shall not issue letters, but shall continue further proceedings in the premises until the next term of such court thereafter, when such court may order the possession of such estate to be delivered over to such widow, and that no letters thereon shall be issued.

Re-appraisement, &c.

SEC. 135. At such term of the court, any creditor, heir or legatee, may resist the entering of such order, and on the filing of an affidavit stating that he verily believes such estate was improperly valued, and that the same exceeds three hundred dollars, or that property belonging to such decedent was not embraced in the inventory, such court shall appoint two other disinterested householders of the county, who shall proceed to re-appraise said estate under the same regulations as in case of the first appraisement, and shall make report thereof at such term; and if such appraisers find such estate not to be worth over three hundred dollars, such court shall order the same to be delivered into the possession of such widow, and that no letters shall issue; and if at any time any executor or administrator discover that the estate committed to his charge is not worth over three hundred dollars, and the widow of the deceased be living, he shall so report to the court, when, after deducting expenses of administration, such court shall order the possession of such estate to be delivered to such widow,

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and discharge such executor or administrator from the further administration thereof.

Clerk shall give widow certificate; widow not liable for debts, except mortgages, funeral expenses, &c.

SEC. 136. Upon such court ordering the delivery of possession of such estate to such widow, such clerk shall make out, and deliver to her, a certificate thereof, which shall be all the authority necessary to enable her to sue for and recover all debts due the decedent, and the possession of any property belonging to such estate, such suit being prosecuted in her own name, and such widow shall not be liable for any of the decedent's debts, except mortgages of real estate, but she shall pay and may be sued for reasonable funeral expenses of the deceased; and expenses of his last sickness.

DISTRIBUTION OF THE SURPLUS OF ESTATES.

I.—*To Heirs.*

Distribution to heirs.

SEC. 137. When the deceased shall have died intestate, the surplus remaining after the payment of all debts, and in case of a will, after the payment of all debts and legacies, shall be distributed to the legal heirs thereof according to the law of descent in force in this State, unless such decedent was an inhabitant of another State, in which case such surplus shall be distributed according to the laws of that State. *

Notice of distribution.

SEC. 138. At the term when final settlement of an estate is made, if there be any surplus, the court shall order notice to be given thirty days before the ensuing term, for three weeks successively in some newspaper printed and published in the county; if there be any, and by notices posted up in five public places in the county, that at the next term, on the first day thereof, such surplus will be distributed among the heirs according to law.

Manner of distribution.

SEC. 139. At the next term after such publication, if any of the heirs shall appear and prove their heirship to the satisfaction of the court, after having examined the heirs applying, and any other person deemed proper, under oath, touching the number of decedent's heirs, and their degrees of rela-

* A resident of this State died, leaving heirs of the whole blood and the heirs of a deceased half-sister. The intestate owned property in this State and in Mississippi. An administrator was appointed in each of the States. Under the laws of Mississippi, the half-blood did not inherit. Three hundred dollars remained in the hands of the administrator here, and 3,277 dollars in the hands of the administrator in Mississippi. Under an order of the court of the latter State, to which the heirs were not parties, the administrator there distributed, to the brothers and sisters of the whole blood, the sum in his hands, which amounted to over 600 dollars to each. The heirs of the half-blood, in their petition below, claimed the whole amount in the hands of the administrator here for distribution. The court refused to grant their petition. Held, that there is no objection to allowing the petitioners the 300 dollars in the hands of the administrator here.—*McCleary et al.* vs. *Matson, adm'r.*, 2 Carter's Ind. Rep. 79.

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tionship to him, such court shall order the clerk to distribute such surplus among the heirs applying, reserving the shares of those who have not proven heirship, until they appear in court in person, or by guardian or attorney, and establish their heirship, when the court shall order payment to be made to them, such guardians, or attorneys,

Refunding bond

SEC. 140. In making such order of distribution, the court may require of the distributees respectively, before receiving their shares, to file in the office of such clerk a bond with sufficient surety, payable to the State of Indiana, conditioned for the refunding of their rateable proportions of the estate, to any heir who may afterward appear; but no heir shall bring suit on such bond unless he was a minor, insane, or a non-resident of this State at the time of such distribution.

II.—*Where there are no Heirs.*

Real estate to be leased.

SEC. 141. If, at the final settlement of an estate, there be real estate undisposed of, and no heirs who are entitled to its possession, claiming it, if there be an executor thereof, the court shall direct him to lease such real estate, if it be susceptible of producing rent, to any person, for a period not over one year, taking bond of the lessor, with sufficient surety for the amount of such rent, conditioned to keep in good order such premises, and the payment of the taxes thereon; and if there be no executor, the court shall direct the administrator of such estate to lease such real estate, under the same regulations as are provided in the case of an executor; but before proceeding to such duties, such executor or administrator shall execute a bond payable to the State of Indiana, with a penalty in double the value of such real estate, with surety to be approved by the court, conditioned for the faithful performance of the duties of his trust.

May order release, &c. Sale.

SEC. 142. Such court may, from time to time, order the re-leasing of such real estate, in case the heirs thereof do not appear and establish their heirship, until the expiration of five years after such final settlement, when if no heirs appear, the court shall order such executor or administrator to sell such real estate under the same regulations as are provided in case of sales of real estate, where the personal is insufficient to pay debts, and upon the purchase-money therefor being paid into court, the clerk shall pay the same to the treasurer of the county, who shall pay it to the Treasurer of State, on whose books it shall be credited to the unknown heirs of the deceased.

Money, where paid.

Heirs not appearing, money paid to Treas. of State.

SEC. 143. If, after the expiration of two years from the final settlement of an estate, no heirs appear to claim the surplus, or any part thereof, the court shall direct it to be paid over to the county treasurer, to be by him paid over to

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the Treasurer of State, who shall credit it upon his books to the unknown heirs of the decedent.

Notice to unknown heirs.

SEC. 144. The court may direct notice to such unknown heirs, of the pendency of such proceedings, to be given at any time before such five years have elapsed, in any newspaper printed and published in the United States.

Proceedings against executor, &c., for failure to pay over money, &c.

SEC. 145. If such executor or administrator fail to pay into court any money belonging to such estate, of which there are no known heirs, or fail to account for the rent of such real estate, the court shall remove him from his trust, and appoint a successor, who, having qualified and given bond according to law, shall bring suit against such delinquent executor or administrator on his bond, which suit the prosecuting attorney of the proper court shall prosecute, he being allowed by such court a reasonable compensation therefor, to be paid out of the damages assessed in such suit.

Duty of judge, Auditor and Treas. of State.

SEC. 146. The judge of the proper court of common pleas shall report to the Auditor of State, within thirty days after the same is paid into the court, the amount of money belonging to unknown heirs, which has been directed to be paid to the county treasurer, with the names of the decedent and the executor or administrator, and such auditor shall enter the same on his account against the Treasurer of State, who shall order suit to be brought against all officers on their bonds, who are delinquent in the management of the same.

Heirs appearing, &c., entitled to estate.

SEC. 147. If at any time after the receipt of the procceds of such estate by the Treasurer of State, the heirs of such decedent appear before any court of competent jurisdiction, and prove their heirship, such Treasurer of State, on a certified copy of the record of such proceeding, signed by the clerk of such court, and attested by his official seal, being presented to him, shall pay to such heirs the amount of such estate in the State Treasury.

RIGHTS AND LIABILITIES OF EXECUTORS AND ADMINISTRATORS.

I.—*Compensation.*

Allowance for administration.

SEC. 148. Every executor and administrator shall make out, at the final settlement of the estate committed to his trust, a full statement of his services, to the truth of which he shall take and subscribe an oath thereto attached, and the court, after examining him and any other person under oath touching such services, may allow such executor or administrator such compensation as it may deem just. *

* It appeared on the settlement of an estate in the probate court, that the payments which had been made by the administrator, amounted to $3,010. Held, that an allowance to the administrator of 180 dollars, as commissions, was not objectionable as being too high.—*Ray et ux.* vs. *Doughty et al.*, 4 Blackf. 115.

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Executors and administrators—compensation—attorney's fees—right to sue.

Allowance for attorney's fees, &c.

SEC. 149. Such court may allow to such executor or administrator reasonable attorney's fees, where he employs an attorney in the management of such estate; but in no case shall such attorney's fees be included in the allowance to such executor or administrator for his personal services; and, at the end of each year after the first issuing of letters, [such court] may [also] allow him for such services during the preceding year, upon his making an affidavit that he has not already been allowed therefor.

When compensation is stated in will.

SEC. 150. When provision is made by will for the compensation of an executor, the same shall be deemed full satisfaction for his services, unless he shall in writing filed in such court, renounce all claim to such compensation.

II.—*Right to Sue.*

Executor, &c., may sue; not liable for costs, &c.

SEC. 151. Every executor or administrator shall have full power to maintain any suit in any court of competent jurisdiction, in his name as such executor or administrator, for any demand of whatever nature due the decedent in his lifetime, for the recovery of possession of any property of the estate; and for trespass or waste committed on the estate of the decedent in his lifetime; but he shall not be liable, in his individual capacity, for any costs in such suit, and shall have power at his option, to examine the opposite party, under oath, touching such demand, but evidence thus obtained shall not afterwards be used in any prosecution against such party.

Copy of letters sufficient evidence of right to sue.

SEC. 152. In any suit contemplated by the preceding scetion, it shall not be necessary for such executor or administrator to make profert of his letters, nor shall his right to sue as such executor or administrator be questioned, unless the opposite party shall file a plea, denying such right, with his affidavit to the truth thereof thereunto attached; in which case a copy of the letters issued to such executor or administrator, duly authenticated, shall be all the evidence necessary to establish such right.

Suit not to abate on account of death, &c., of executor, &c. Survivor, &c., to prosecute.

SEC. 153. If, at the time any executor or administrator shall die, resign or be removed, any suit or proceeding be pending in any court, in which his name, in his fiduciary capacity, is used, such suit or proceeding shall not abate or be discontinued, but the same shall be prosecuted or defended by the remaining executor or administrator, if there be one, or by his successor, the name of such survivor, or successor, being substituted in such suit or proceeding instead of that of the executor or administrator whose authority has ceased; nor shall such suit or proceeding be continued to

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another term on account of such death, unless at the option of such survivor or successor.

Order to be evidence

SEC. 154. Every order obtained in good faith by such executor or administrator, in the proper court of common pleas, remaining unreversed, shall be *prima facie* evidence in his favor.

How executor, &c., may prosecute writ of error.

SEC. 155. Any executor or administrator shall have power to prosecute any writ of error or appeal taken by the testator or intestate, or by his predecessor, and may have execution and other legal process issued on any judgment obtained by the testator or intestate, or by his predecessor in the trust, without reviving the same by *scire facias*, or any other notice to the judgment-defendant.

Power of executor of executor.

SEC. 156. An executor of an executor shall have no authority to commence or maintain any action or proceeding relating to the estate or rights of the testator of the first executor, or to take control thereof as such executor.

Wills executed in another State

SEC. 157. When a will is executed in another State or country, and admitted to record in this State, in pursuance of the provisions of this act, the executor or administrator with the will annexed, and any trustee appointed by such will, or by any court of this State to perform any duty, or carry into effect any trust created by such will, shall have all the rights, powers and authority, and shall be subject to the same liabilities respecting their respective duties and trusts, as executors, administrators with the will annexed, and trustees under wills duly executed and admitted to probate in this State.

Jurisdiction of courts in such case.

SEC. 158. The courts of this State shall, in all such cases, have the same jurisdiction and powers over the appointment, filling vacancies, requiring sureties, and enforcing, directing, and restraining the performance and execution of the duties and trusts of such executors, administrators with the will annexed, and trustees, as are given to such courts respecting the same matters arising under wills duly executed and admitted to probate in this State.

Non-resident executor, &c.

SEC. 159. A non-resident executor or administrator, duly appointed in any other State or country, may commence and prosecute any suit in any court of this State, in his capacity of executor or administrator, in like manner and under like restrictions as a resident; and a copy of his letters, duly authenticated, in like manner as provided in this act, being produced and filed in the court in which such suit is brought, shall be sufficient evidence of his due appointment: *Provided*, That he shall give bond for costs under the laws regulating the maintaining of suits by non-resident citizens.

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Executors and administrators—what charged with—suit on bond.

III.—*With what Charged.*

Executor, &c., with what charged.

SEC. 160. Every executor or administrator shall be chargeable with the amount of all inventories filed by him, and the value of all property of the estate of the decedent in his possession, and may show, in accounting therefor, that such property was sold according to law, the amount of such sales, the amount taken by the widow, and the loss on account of desperate claims, and the compounding thereof under the order of the court; but all returns, accounts and reports, made by an executor or administrator, shall have an affidavit of the truth thereof, by him subscribed, thereunto attached.*

IV.—*May be Attached and Imprisoned.*

May be attached and imprisoned.

SEC. 161. In addition to removing him, if any executor or administrator shall embezzle or conceal any of the property of the decedent, the court shall attach his person and property, and examine him under oath touching such property, and on his refusing to answer in such examination, or to deliver up such property, or secure the value thereof to the persons interested in such estate, with ten per centum damages thereon, shall commit him to jail until the order of the court is complied with, or he be discharged according to law.

V.—*Suit on Bond.*

For what causes.

SEC. 162. Any executor or administrator may be sued on his bond, by any creditor, heir, legatee, or surviving or succeeding [executor or administrator,] co-executor or co-administrator of the same estate, for any of the following causes, viz:†

First. Failure to inventory the property of the decedent, to return inventories, appraisement bills, sale bills, reports, and accounts of sale, according to law.

Second. Failure to pay money of the estate into court, according to law.

*The probate court on the settlement of an estate of which A. and B. were administrators, had charged A. with only $3,010, although the inventory and sale-bill, signed by both administrators, amounted to a larger sum. Held, that the record of the probate court, in the absence of all proof except the inventory and sale-bill, was conclusive proof that the sum charged to A. was the whole amount that had come to his hands to be administered.—*Ray et ux.* vs. *Doughty et al.*, 4 Blackf. 115.

An executor may be passive, by not obstructing his co-executor from obtaining the assets, without making himself responsible even to the creditors of the estate. *Ibid.*

†Administrators are not liable for the mismanagement of their co-administrators, where they are not themselves in any manner culpable. An administrator may be passive without being chargeable.—*Davis et al.* vs. *Walford, adm'r.*, 2 Carter's Ind. Rep. 88.

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Third. Failure to use due diligence in collecting claims due the estate.

Fourth. Want of reasonable care in taking solvent sureties to all obligations, to secure the purchase-money of any of the property of the decedent.

Fifth. Embezzling, concealing, or converting to his own use such property.

Sixth. Negligently permitting any of the property of the decedent to be injured.

Seventh. For committing any waste upon the real estate of the decedent, or knowingly permitting the same to be done, when such real estate is in his possession and control as such executor or administrator.*

Eighth. Failure to render an account of his proceedings whenever required by the court, or the provisions of this act.

Ninth. Non-compliance with any order of the court touching the estate.

Tenth. Any other violation of the duties of his trust.

Who may bring suit; costs, how taxed; damages

SEC. 163. Such suit may be brought by, and on the relation of, any such creditor, heir, legatee, surviving, succeeding [executor or administrator,] co-executor or co-administrator, but no costs shall be taxed in such proceeding, against the estate, unless it is brought by such surviving, succeeding [executor or administrator,] or co-executor or co-administrator; and the measure of damages in all such suits, shall be the value of the property converted, destroyed, embezzled or concealed, the injury sustained by the estate, or any person interested therein, interest on money retained, such exemplary damages as the court or jury trying the case

* The widow and administratrix of A., being in her nineteenth year, recovered from her co-administrators, B. and C., certain goods as her legal portion of her deceased husband's estate. Held, that in case the widow committed a devastavit of the goods, and it be considered that B. and C., by the delivery of them to her, had contributed to that devastavit, B. and C. may be liable to the creditors of the intestate for such delivery of the goods, but they cannot be liable for it to the widow herself.—*Ray et ux.* vs. *Doughty et al.*, 4 Blackf. 115.

Held, also, that whilst the letters of such infant administratrix remained unsuspended and unrevoked, the payments made to her by the debtors of the intestate, and the delivery of the goods to her by her co-administrators, are to be considered in the same light as if her authority were undisputed.—*Ibid.*

An administratrix took into her possession a part of the assets, with the knowledge of her co-administrators, and converted them to her own use. Held, that though the administratrix were a minor, her co-administrator was not liable for her devastavit.—*Ibid.*

An administrator is liable for any interest he may have collected on the debts due to the estate.—*Ibid.*

If an administrator lend the money of an estate without an order of court, while there are debts to pay, and the money be not repaid, he is guilty of waste.—*The State* vs. *Johnson et al.*, 7 Blackf. 529.

For waste committed by an administrator, who has been removed from office, a suit (without a previous judgment against him,) may be brought against him and his surety on the administration bond, on the relation of his successor.—*Ibid.*

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may be willing to give, and ten per centum on the whole amount assessed.

Benefit of stay and valuation laws not allowed; damages, where paid.

SEC. 164. No stay of execution, or benefit of valuation, or appraisement laws, shall be allowed on a judgment on such bond as to the property of the principal; and all damages so collected shall, by the officer collecting the same, be paid into the proper court of common pleas, when, after deducting and paying to the relator in such suit, a reasonable compensation for his services therein, it shall be disposed of according to the laws regulating the distribution of the property of the decedent.

Sureties liable after new bond is required.

SEC. 165. When any new bond shall be required of an executor or administrator, the sureties in the prior bond shall, nevertheless, be liable for all breaches of the conditions of such prior bond, committed or suffered before the new bond shall be approved by the court, and for every failure of such executor or administrator to perform any duty, service or obligation, in fully accounting for, and paying over to the proper person, all the assets which may have come into his hands, as executor or administrator.

GENERAL PROVISIONS RESPECTING DUTIES OF CLERKS OF COURTS OF COMMON PLEAS.

Clerk shall report all failures to return inventories, sale bills, &c.

SEC. 166. In addition to the duties of the clerk of the court of common pleas, hereinbefore enumerated in this act, it shall be his duty to report to the proper court of common pleas, all failures of any executor or administrator to return or file any inventory, sale bill, account, report, proceeding or other matter, within the time prescribed by law, or the order of the court, at the next term of such court thereafter; and such court shall at every term interrogate such clerk under oath touching such failures, whether any have occurred during the vacation, and who are the delinquents.

Shall procure judgment and appearance dockets.

SEC. 167. In addition to an order book, in which the proceedings of the court are entered, such clerk shall procure a judgment docket in which all allowances, in their order, with date of allowance, amount thereof and credits thereon, shall be entered; an appearance docket, in which the names of the executor or administrator of every estate unsettled, together with a marginal note of the proceedings in such estate necessary to be had at the term for which such docket is made up; what returns such executor or administrator is required by law or the order of the court to make at such term; receipts of all money of such estate, paid in at such term; and the names of parties to claims, and their attorneys.

Also a docket for bonds.

SEC. 168. Such clerk shall also provide a docket in which all executors', administrators' or guardians' bonds, and all

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bonds required by virtue of this act, shall be recorded, within ten days after the same are filed; and such clerk failing to do so, shall be liable to a prosecution and fine for malfeasance in office, and for all damages occasioned by such failure, in a suit on their official bonds.

Also docket for inventories, sale bills, &c.

SEC. 169. Such clerk shall also keep a docket in which he shall record, within thirty days after the same are filed or entered, all inventories, sale bills, and orders for sale of real estate, which shall be all the final record of the proceedings in any estate of a decedent, necessary to be made.

Also docket for letters testamentary, &c.

SEC. 170. Such clerk shall also keep a docket in which he shall record all letters testamentary, and of administration, within ten days after the same are issued.

Business, how disposed of.

SEC. 171. The business of every estate shall be disposed of in the order in which it is entered in the appearance docket.

NOTICES AND PROOF THEREOF.

Notices.

SEC. 172. Upon the return of an officer that any person required to be notified by the provisions of this act of the pendency of any proceeding, cannot be found, or upon the filing of an affidavit, by any disinterested person, in court or in vacation, that such person is a non-resident of this State, or that his residence is unknown, notice may be given to him by publication, as is provided in such cases.

Copy, with affidavit, to be filed.

SEC. 173. An executor or administrator, whose duty it is to give any of the notices required by the provisions of this act, shall file a copy of every such notice in the office of the clerk of the court of common pleas, with an affidavit thereon made by such executor or administrator, or a competent witness, before some officer duly authorized to administer oaths, stating the times and places when and where such notices were published or set up.

Copy to be evidence.

SEC. 174. Such copy of any notice, verified as aforesaid, and duly certified by the clerk of said court, shall be received in evidence in any court in this State, and be deemed sufficient proof of the matters and things therein contained.

Preceding sections, how construed.

SEC. 175. Nothing contained in the two preceding sections, shall preclude such executor or administrator, or any other person, from proving, in any suit or proceeding, that the provisions of this act respecting such notice, have been complied with, although no such copy or affidavit may have been filed as therein required.

WHERE INFANTS ARE PARTIES.

Infants to appear by guardian, &c.

SEC. 176. In all suits and proceedings instituted under the provisions of this act, in which infants may be plantiffs, complainants or defendants, such infants shall appear by their

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guardian at law, or guardian *ad litem*, appointed by the court; and such suits or proceedings, if conducted in good faith, shall not be liable to be opened by such infants, upon arriving at full age.

When infant may have proceedings opened

SEC. 177. Any such infant, after arriving at full age, may, within three years thereafter, upon the proper proceedings being instituted by him, have any judgment, order or decree, opened or annulled, or set aside, if he can show that the same was obtained by mistake, or through fraud.

LIABILITIES OF HEIRS, DEVISEES, AND DISTRIBUTEES.

Liability of heirs, &c.

SEC. 178. The heirs, devisees and distributees of a decedent, shall be liable to the extent of the property received by them from such decedent's estate, to any creditor whose claim remains unpaid, who, six months prior to such final settlement was insane, an infant, or out of the State; but such suit must be brought within one year after the disability is removed.

Suit, where and against whom instituted.

SEC. 179. Such suit shall be instituted in any court of competent jurisdiction, against all who are liable who can be reached with process, and their representatives, by petition, and the costs in such suit shall be apportioned among the defendants, in proportion to the amount recovered of each of them.

When court may decide that debt shall be levied of real estate.

SEC. 180. Unless it shall appear to the court that the real estate which has descended, or was devised to any such defendant, and on account of which the creditor is entitled to recover against him, was alienated by him in good faith subsequently to the final settlement of the ancestor or devisor, by the executor or administrator, and before the commencement of such suit, the court may decree that the debt of the claimant shall be levied of such real estate; and every such decree against the same, shall have preference as a lien thereon, to any judgment or decree obtained against such defendant personally, for any debt or demand in his own right.

Real estate alienated as above, not liable. Deft. personally liable.

SEC. 181. But no real estate thus descended or devised to such heir or devisee, and alienated by him in good faith after the final settlement of the estate of the ancestor or devisor, and before the commencement of such suit, shall be liable to execution, or in any manner affected by a decree against such defendant in the premises; but he shall be personally liable on such execution or decree for the amount proper to be recovered against him, as for his own debt, not to exceed the value of such real estate, unless he is liable on account of personal assets, in which case he shall be also liable to an amount not to exceed the value of such assets.

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When land so aliened may be taken.

SEC. 182. When such real estate has been aliened by any such defendant, but is liable to be reached by such decree, the same shall not be taken and sold by virtue thereof until the other property of the defendant, subject to execution, has been exhausted; and in that case any deficiency shall be supplied by resort to the property thus aliened.

Deft., to what extent liable.

SEC. 183. No more shall be recovered against any such defendant than his just proportion of any such debt, whether he has become liable therefor on account of real estate, or any interest therein, or on account of personal assets, unless the others are beyond the reach of process or unless after due diligence, the amount cannot be recovered from the others, who are liable with him; in which case he shall be liable therefor to the extent of the real and personal assets received by him.

One or more devisees, &c., may be made exclusively liable.

SEC. 184. If, by the will of the deceased, any part of his estate, or any one or more of the devisees or legatees shall be made exclusively liable for the debt, in exoneration of the estate, or of the devisees or legatees, the provisions of the will shall be complied with, in that respect; and the real estate, and the persons so exempted by the will, shall be liable only for so much of the debt as cannot be recovered from those first chargeable therewith.

Heirs, &c., may be sued jointly, &c.

SEC. 185. Heirs, devisees, and distributees, may be sued jointly in any such suit, and no such suit shall be barred or dismissed for want of including all the persons as defendants who might have been included; and in any stage of the proceedings the court may award to the complainant proper process to bring in other parties, and may allow such amendments as may be necessary to charge them as defendants, on such terms as the court shall think reasonable.

Suit, &c., not delayed by infancy of heir, &c.

SEC. 186. No such suit shall be delayed, nor shall the remedy of a claimant be suspended by reason of the infancy of any heir, devisee, or distributee; but guardians to defend their rights in such suit shall be appointed as in other cases.

Execution, when to be executed, &c.

SEC. 187. When a decree shall be rendered against defendants who are infants, no execution issued thereon shall be executed against them, until the expiration of one year after the rendition of such decree; but such execution may be executed against other defendants in the same suit who are of full age as in other cases; and whenever any heir, devisee or distributee shall have been compelled to pay more than his just proportion, he may have his action, severally or jointly with others, to recover of the other heirs, devisees, or distributees liable therefor, the amount which he may have thus been compelled to pay.

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TRIAL BY JURY.

Trial by jury.

SEC. 188. Trials by jury shall be allowed at the request of any party in all cases where there is an issue of fact; and in any such case, the court shall direct the sheriff to summon a jury of twelve householders of the county, unless the party demanding a jury consent to a less number; and in all such trials, such court and jury shall be governed by the same regulations, not inconsistent with this act, as are provided in the case of trials in the circuit court.

APPEALS.

Appeal.

SEC. 189. Any person considering himself aggrieved by any decision of a court of common pleas growing out of any matter connected with a decedent's estate, may prosecute a writ of eror or appeal to the circuit or supreme court, upon filing with the clerk of such court of common pleas, a bond with penalty in double the sum in controversy, in cases where an amount of money is involved, or where there is none, in a reasonable sum, to be designated by such clerk, with sufficient surety, payable to the opposite party in such appeal, conditioned for the diligent prosecution of such appeal, and the payment of all costs, if costs be adjudged against the appellant.

Appeal-bond, when to be filed.

SEC. 190. Such appeal-bond shall be filed within thirty days after the decision complained of is made, unless for good cause shown, the court to which the appeal is prayed, shall direct such appeal to be granted on the filing of such bond within one year after such decision; but any person who is aggrieved, desiring such appeal may take the same in his own name, without joining with any other person.

Writ of error.

SEC. 191. In case a writ of error is prayed for, the same regulations which prevail in the prosecution of such writs from the circuit to the supreme court shall govern.

Rules for taxing costs.

SEC. 192. In taxing costs against the parties to such appeal, the same rules shall be observed, as in cases of appeals from justices of the peace to the circuit court.

Executor, &c., need not file appeal-bond, &c.

SEC. 193. In any appeal prayed for by an executor, administrator or guardian, from the decision of any court, it shall not be necessary for such person to file an appeal-bond nor shall such bond be required of him in prosecuting a writ of error.

FORMS OF PROCESS, INVENTORIES, BONDS, SALE BILLS, &c.

Forms.

SEC. 194. The following forms shall be substantially adopted, wherever they are applicable, in the execution of a

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will, or administration of an estate of a decedent, the names therein being changed to suit each particular case:

Citation to an Executor to Prove a Will.

State of Indiana, }
Monroe county. }

The State of Indiana to John Stout:

Citation to prove will.

As information has been given us that John Jones of said county died lately, having previously made a written will, in which he appointed you executor thereof; therefore you are hereby cited to appear before us on the ——— day of ———, at our office, (or before the court of common pleas of such county on a day and term mentioned,) then and there to make probate of said will, and take letters testamentary thereon.

In witness, I, Milton McPhetridge, clerk of the court of common pleas of said county, have hereunto set my hand, and affixed the seal of said court, the ——— day of ———.

[SEAL.]

MILTON McPHETRIDGE.

Citation to Keeper of a Will.

State of Indiana, }
Monroe county. }

The State of Indiana to John Stout:

Citation to keeper of will.

As information has reached us that you have possession of the last will of John Jones, deceased, you are hereby cited to appear before us, (or in court at a time mentioned,) on the ———day of ———, and deliver such will to us for probate.

In witness, I, Milton McPhetridge, clerk of the court of common pleas of said county, have hereunto set my hand, and affixed the seal of said court, the ——— day of ———.

[SEAL.]

MILTON McPHETRIDGE.

Certificate of Probate of Will.

State of Indiana, }
Monroe county. }

Certificate of probate of will.

I, Milton McPhetridge, clerk of the court of common pleas of said county, certify that the within last will of John Jones, late of ——— county, deceased, has been duly admitted to probate; that its due execution was this day proven by

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———, whose proofs, together with such will, have been duly recorded on —— page of the record of wills in our office.

In witness whereof, I have hereunto set my hand, and affixed the seal of said court, this ——— day of ———.

[SEAL.]

MILTON McPHETRIDGE.

Citation to a Widow.

State of Indiana, }
Boone county. }

The State of Indiana to Mary Jones:

Citation to widow

At the instance of ———, you are hereby cited to appear before us on the ——— day of ———, at our office, (or before the court of common pleas of such county, on a day and term mentioned,) then and there to take administration of the estate of your deceased husband, John Jones.

In witness, I, Milton McPhetridge clerk of the court of common pleas of said county, have hereunto set my hand, and affixed the seal of said court, the ———day of ———.

[SEAL.]

MILTON McPHETRIDGE.

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*Statement of claim of creditor applying for Letters.**

State of Indiana, }
Ohio County. }

Statement of creditor applying for letters.

I, Daniel Long, a resident of the State, do swear that John Jones, late of the county of Ohio, deceased, died indebted to me in ——— dollars and —— cents, which sum is still due me.

DANIEL LONG.

Subscribed and sworn to before me, the —— day of ———.

MILTON McPHETRIDGE,
C. C. C. P. of Ohio county.

Affidavit of Executor as to the value of the decedent's property.

State of Indiana, }
Monroe county. }

Affidavit of executor as to value of decedent's property.

I, John Stout, swear that the value of the personal property of John Jones, deceased, (and of the real estate directed by

* See ante, p. 251, R. S. vol. 2.

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his will to be sold,) does not exceed the sum of——dollars, as I believe, so help me God.

JOHN STOUT.

Subscribed and sworn to before me, the —— day of ——.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Affidavit of the Administrator as to the value of the Intestate's property. *

State of Indiana, }
Monroe county. }

Affidavit of admr. as to value of intestate's property.

I, John Stout, swear that the personal property of John Jones, deceased, is not worth over ——— dollars, as I believe, so help me God. JOHN STOUT.

Subscribed and sworn to before me, the —— day of ——.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Oath of Sureties, as to the value of their property.†

State of Indiana, }
Monroe county. }

Oath of sureties as to value of their property.

I, John Brown, swear that I am worth, over and above my indebtedness, ——— dollars, as I believe, so help me God.

JOHN BROWN.

Subscribed and sworn to before me, the —— day of ——.

MILTON McPHETRIDGE,
C. C. C. Monroe county.

Oath of Executor or Administrator on taking Letters.‡

State of Indiana, }
Monroe county. }

Administrator's oath.

I, John Stout, swear that I will faithfully discharge the duties of my trust, as executor of the last will (or administrator of the estate,) of John Jones, deceased, according to law, so help me God. JOHN STOUT.

Subscribed and sworn to before me, the —— day of ——.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

* See ante, p. 251, R. S. vol. 2. † See sec. 19 of this chapter, p. 251.

‡ See sec. 19 of this chapter, p. 251.

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*Executor's or Administrator's Bond.**

Bond.

Know all men, That we, John Stout, Thomas Bond and John Brown, are bound unto the State of Indiana, in the penal sum of ——— dollars, for the payment of which we, jointly and severally, bind ourselves, our heirs, executors and administrators. Sealed and dated the —— day of ———.

The condition of the above obligation is, that if the above bound John Stout shall faithfully discharge the duties of his trust as executor of the last will (or as administrator with the will annexed,) (or as administrator of the estate) of John Jones, deceased, according to law, then the above obligation is to be void, else to remain in full force.

JOHN STOUT, [*Seal.*]
THOMAS BOND, [*Seal.*]
JOHN BROWN, [*Seal.*]

Approved by me, the ——— day of ———.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Letters Testamentary, and with Will annexed.†

Letters testamentary and with will annexed.

I, Milton McPhetridge, clerk of the court of common pleas for the county of Monroe, in the State of Indiana, do certify the annexed to be a true copy of the last will of John Jones, late of said county, deceased, and of the certificate of probate as endorsed thereon; and, John Stout having duly qualified and given bond as required by law as executor, (or administrator with the will annexed,) is duly authorized to take upon himself the administration of said estate, according to such will.

[SEAL.] Witness my hand, and the seal of said court, the ——— day of ———.

MILTON McPHETRIDGE.

Letters of Administration.‡

Letters of administration.

I, Milton McPhetridge, clerk of the court of common pleas for the county of Monroe, in the State of Indiana, do hereby certify that administration of the personal property of John Jones, late of Monroe county, deceased, who died intestate, is granted to John Stout; and the said John Stout having qualified and given bond as such administrator, is

* See sec. 19 of this chapter, p. 251.

† See sec. 1 and 6, p. 246 and 247, R. S. vol. 2.

‡ See sec. 7, p. 247, R. S. vol. 2.

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duly authorized to take upon himself the administration of such estate according to law.

[SEAL.] Witness my hand, and the seal of said court, this ——— day of ———.

MILTON McPHETRIDGE.

---

*Citation to Executor or Administrator of the pendency of an application to remove him.**

State of Indiana, }
Cass county, }

The State of Indiana to John Stout,
Executor of the last will (or Administrator of the estate) of John Jones, deceased:

Citation to executor, &c.

As Daniel Brown has this day filed in our court of common pleas, a petition to remove you from your trust, on account of (here state, concisely, the causes alleged in the petition,) you are therefore cited to appear before such court, on the first day of the next term thereof, and defend if you choose.

[SEAL.] In witness, I, Milton McPhetridge, clerk of said court, have hereunto set my hand and affixed the seal of said court, the —— day of ———.

MILTON McPHETRIDGE.

Notice to non-resident Executor of proceedings to remove him.†

Notice to non-resident executor, &c.

Notice is hereby given that John Craft has filed his petition in our court of common pleas, to remove John Stout from his trust as executor of the last will of John Jones, deceased; and if said John Stout does not appear at the next term of such court, the petition will be heard in his absence.

(Attest:) MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Notice of appointment as Executor or Administrator.‡

Notice of appointment.

Notice is hereby given that the undersigned has been appointed executor of the last will (or administrator of the estate) of John Jones, late of Monroe county, deceased. Said estate is supposed to be solvent (or insolvent.)

JOHN STOUT,
Executor (or Administrator.)

* See sec. 23, p. 253, R. S. vol. 2. † See sec. 24, p. 253, R. S. vol. 2.
‡ See sec. 33, p. 254, R. S. vol. 2.

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INVENTORY OF PERSONAL AND REAL ESTATE.

I.—*Affidavit of Appraisers.**

State of Indiana, }
Monroe county. }

We, Robert Sites and John Beem, swear that we will honestly appraise the personal and real estate of John Jones, deceased, which may be exhibited to us. So help us God. Form of inventories, &c.

ROBERT SITES, }
JOHN BEEM, } *Appraisers.*

Subscribed and sworn to before me, the —— day of ——.

JACOB SHEETS, J. P., [L. S.]

II.—*Form of Inventory of Personal Estate.*†

An Inventory of the personal estate of John Jones, deceased, taken by John Stout, Executor, (or Administrator,) and appraised by Robert Sites and John Beem.

No.	*Description of Property.*	*Valuation of property.*	No.	*Property taken by the Widow.*	*Value of property taken by the Widow.*
1	Fifteen head of hogs	$35 00			
2	One sorrel mare	45 00	2	One sorrel mare	$45 00
3	One bay colt	20 00	3	One bay colt	20 00
4	One man's saddle	8 00			
5	One milch cow	12 00			
6	One fancy bedstead	10 00	6	One fancy bedstead	10 00
7	One plain bedstead	5 00	7	One plain bedstead	5 00
8	One fine bureau	20 00	8	One fine bureau	20 00
9	One plain bureau	10 00			
10	One fine dining table	10 00			
11	One plain dining table	5 00	11	One plain dining table	5 00
12	Two beds and bedding	25 00	12	Two beds and bedding	25 00
13	One cooking stove and furniture	15 00	13	One cooking stove and furniture	15 00
14	One dozen chairs	12 00	14	One dozen chairs	12 00
15	One cradle	3 00	15	One cradle	3 00
16	Cupboard ware	15 00	16	Cupboard ware	15 00
17	Note on G. M. due 10th day of July 1863, dated Dec. 25th, 1851, with interest from date	40 00			
18	One lease on I. J., for rent of land	50 00			
19	One mortgage on lands of K. L. due 10th June '52, for	500 00			
20	Account on M. N.	6 00			
21	Money on hand	75 00	21	Money on hand	75 00
	Total personal	$921 00		Total	$250 00

Signed by us the ——— day of———.

ROBERT SITES, }
JOHN BEEM, } *Appraisers.*

* See sec. 34, p. 255, R. S. vol. 2. † See p. 255, R. S. vol. 2.

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*Widow's Receipt.**

Received of John Stout, executor of the last will (or administrator of the estate) of my late husband, John Jones, deceased, the articles charged to me in the foregoing inventory, the ——— day of ———. MARY JONES.

If real estate is to be sold by the terms of a will, or because of the insolvency of the estate, and that fact be made known at the time of making out the foregoing inventory, it should be inventoried, appraised, and such inventory and appraisement attached to the same paper, immediately after the enumeration of the personal property, as follows:

III.—*Form of Inventory of Real Estate.* †

An Inventory of the real estate of John Jones, deceased, taken by said Executor (or administrator) and appraised by said appraisers.

No.	Descrption of Property.	Valuation.
1	The N. W. qr. of Sec. 6. T. 9. R. 1 W., situate in the county of Brown,.....	$500 00
2	1 lot in the town of Nashville, and State of Indiana, known as lot No. 29, and improvements thereon,.....	250 00
3	1 out-lot in the town of Bloomington and State of Indiana, known as out-lot No, 6,	500 00
	Total valuation of real estate	$1,250 00

Signed by us, the ——— day of ———.

ROBERT SITES,
JOHN BEEM, } *Appraisers.*

State of Indiana,
Monroe county.

I, John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, swear that the foregoing is a true and complete inventory of all the personal estate (and real estate, if any be appraised,) of said decedent, which has come to my knowledge; and also of the property taken by the widow, (if any,) on the ——— day of ———. So help me God. JOHN STOUT.

Subscribed and sworn to before me, the —— day of ———.‡

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

* See sec. 43, p. 256, R. S. vol. 2.

† See sec. 37, p. 255, and sec. 79, p. 266, as this form applies to both cases.

‡ See sec. 45, p. 257, R. S. vol. 2.

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*Notice of Sale.**

Notice is hereby given, that I will sell, at public auction, on Monday, the first day of June next, at the residence of John Jones, late of Monroe county, deceased, all his personal property, (not taken by the widow, if there be one,) consisting of horses, hogs, &c. A credit of six months will be given on all sums over three dollars, the purchaser giving his note with approved surety, waiving valuation and appraisement laws. Notice of sale.

JOHN STOUT, *Executor*,
April 20th, 1853. (*or Administrator.*)

Petition to sell a Contract for the purchase of Land.†

State of Indiana, }
Allen county. }

The undersigned, executor of the last will (or administrator of the estate) of John Jones, deceased, would represent to the court of common pleas of said county, that said John Jones, in his lifetime, purchased the E. half of section 9, township 10, N. of range 1 W., situate in Monroe county, of one Joseph Howe; that there are yet due thereon two payments, one on the 25th of December, 1852, for one thousand dollars; the other on the 25th of December, 1853, for one thousand dollars; and, that it would be more to the advantage of the estate that the same should be sold, than that the assets of the estate be applied to the payment of the purchase-money, (or that such assets are insufficient to pay such purchase-money.) He, therefore, prays that the decedent's interest in such real estate be sold. Petition to sell contract for land.

JOHN STOUT, *Ex'r*, (*or Admr.*)
Subscribed and sworn to before me, the —— day of ——.
MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Bond to indemnify Executor or Administrator in the sale of such Contract.‡

Know all men by these presents, that we, Charles Wayman, William Ewing and John Mooney, are bound to John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, in the penal sum of four thousand dollars, for the payment of which we, jointly and severally, bind ourselves, our heirs, executors and administrators. Sealed and dated the ——— day of ———. Indemnifying bond.

* See sec. 49, p. 257, R. S. vol. 2. † See sec. 55, p. 258, R. S. vol. 2.
‡ See sec. 57, p. 259, R. S. vol. 2.

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The condition of the above obligation is, that as the above bound Charles Wayman has this day purchased the interest of the estate of John Jones in the E. half of section 9, township 10, N. of range 1 W., on which there is a payment of one thousand dollars due on the 25th of December, 1852, and another of one thousand dollars due on the 25th of December, 1853. Now, if the said Charles Wayman will make such payments, and remove all other charges and liens thereon, and indemnify said John Stout, executor, (or administrator) and all persons interested in said estate, against all demands by reason of any agreement or covenant, in the contract for the purchase of said real estate from said Joseph Howe, then this obligation is to be void, else to remain in force.

CHARLES WAYMAN, [SEAL.]
WILLIAM EWING, [SEAL.]
JOHN MOONEY, [SEAL.]

---

*Notice of the sale of Contract for the purchase of Land.**

Notice of sale of contract for purchase of land.

Notice is hereby given, that I will, on the —— of ———, at the late residence of John Jones, deceased, sell at public auction the decedent's interest in the E. half of section 9, T. 10 N., of R. 1 W., on a credit of ——— months.

JOHN STOUT, *Executor,*
April 3d, 1852. (*or Administrator.*)

Assignment of Contract for purchase of Real Estate.†

Assignment of contract for purchase, &c.

I, John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, hereby assign all of said decedent's interest in the E. half of section 9, T. 10, N., of R. 1 W., for and in consideration of the sum of $500, to me paid.

Witness my hand and seal, the —— day of ——.

JOHN STOUT, *Ex'r,* (*or Admr.*) [SEAL.]

Petition for private sale of Decedent's Personal Estate.‡

State of Indiana, }
Monroe county. }

Petition for private sale.

John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, respectfully represents to the court of common pleas of said county, that it would

* See sec. 56, p. 258, R. S. vol. 2. † See sec. 58, p. 259, R. S. vol. 2.
‡ See sec. 60, p. 259, R. S. vol. 2.

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be of more advantage to the estate of the decedent, that fifteen head of hogs belonging thereto, should be sold at private sale. He therefore prays that an order so to sell them be granted him.

JOHN STOUT, *Ex'r*, (*or Admr.*)

Subscribed and sworn to before me, the —— day of ——.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

*Sale Bills.**

Account of the sale of the personal property of John Jones deceased, sold by Elias Able, at the late residence of the decedent, at public auction, on the ——— day of ———. Sale bill.

No. as on the inventory.	*Name of Articles.*	Sold for.	*To whom sold.*	*Cash or surety.*
1	10 head of hogs,...	$20 00	Robert Holmes	George Murphy
1	5 " " .	10 00	Edwin Parsley	Caleb Davis
4	1 man's saddle,..	7 50	Perry Miller	Henry Shelton
5	1 milch cow,.....	13 00	John Bland	Samuel Work
9	1 plain bureau,...	9 00	Walter Benton	Cash
10	1 fine dining table	11 50	Charles Wyman	"
	Total,.	$71 00		

HADLEY BROWN, *Clerk.*

State of Indiana, }
Monroe county. }

I, Hadley Brown, clerk of the sale of the personal property of John Jones, deceased, swear that the foregoing sale bill is a true account thereof.

HADLEY BROWN.

Subscribed and sworn to before me, the —— day of ———,

JOHN M. SLUSS, [SEAL.]
Justice of the Peace.

*In drafting a sale bill, the clerk will be careful to designate, in a column for that purpose, each article of the inventory by the number as used there. This will save labor, and tend to accuracy in the settlements. See sec. 61, p. 260, R. S. vol. 2.

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State of Indiana, }
Monroe county. } *

I, John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, swear that the foregoing sale bill is a true account of the sale of the personal property of the decedent, not taken by the widow.

JOHN STOUT.

Subscribed and sworn to before me the——day of———.

MILTON McPHETRIDGE.
C. C. C. P. Monroe county.

Citation to pay over money.†

State of Indiana, }
Montgomery county. }

The State of Indiana to John Stout:

Citation to pay over money.

As it has been represented to our court of common pleas, that you have money in your possession belonging to the estate of John Jones, deceased, of which you are administrator, (or executor of will) you are hereby cited to appear instanter (or at the next term) and pay such money into court, or account therefor according to law.

In witness, I have hereunto set my hand, and affixed [*Seal.*] the seal of said court, the ——— day of ———.

MILTON McPHETRIDGE.
C. C. C. P. Monroe county.

Petition to sell Real, the Personal Estate being insufficient to pay debts.‡

State of Indiana, }
Monroe county. }

Petition to sell real estate.

The undersigned, executor of the last will (or administrator of the estate) of John Jones, deceased, would represent to the court of common pleas of said county that the personal estate of the deceased amounts to $921, and that the claims against the same, as appear from the judgment docket of the court, amount to the sum of $1,520, leaving $599 of indebtedness over the value of the personal estate; that the decedent died the owner in fee simple of the N. W. qr. of sec. 6, T. 9, N. of R. 1 E., valued at $1,500; that the decedent left as his heirs, his

* See sec. 160, p. 285, R. S. vol. 2. †See sec. 105, p. 272, R. S. vol. 2.

‡ This form of course must be varied to suit a different case. When there are clauses in the will providing for the sale of the real estate, they must be set forth. See sec. 75, p. 264, R. S. vol. 2.

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widow, Mary Jones, and three children, David, aged eight, Sarah, aged twelve, and Cass, aged six years; all of said county, and who are all the heirs of the decedent known to your petitioner. He therefore asks for an order to sell such real estate. JOHN STOUT.

Subscribed and sworn to before me, the —— day of ———.
MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Notice to Heirs of petition to sell Real Estate.

State of Indiana, }
Monroe county. } *

Notice of petition.

Notice is hereby given, that John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, has filed his petition to sell the real estate of the decedent, his personal being insufficient to pay his debts; and that said petition will be heard at the next term of the court of common pleas of said county.

Test: MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Bond given by Executor (or Administrator) before selling Land.†

Bond.

Know all men by these presents, that we, John Stout, John Mooney and John Burrell, are bound to the State of Indiana in the penal sum of three thousand dollars, to pay which we jointly and severally bind ourselves, our heirs, executors or administrators, sealed and dated the ——— day of ———.

The condition of the above obligation is, that, as the above bound John Stout, as executor of the last will (or administrator of the estate) of John Jones, deceased, has been ordered by the court of common pleas of Monroe county, to sell the real estate of the decedent; now, if the said John Stout will faithfully discharge the duties of his trust, according to law, then the above obligation is to be void; else, to remain in full force in law.

JOHN STOUT, [L. S.]
JOHN MOONEY, [L. S.]
JOHN BURRELL, [L. S.]

Approved the ——— day of ———.
MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

*See sec. 76, p. 265, R. S. vol. 2. †See sec. 82, p. 267, R. S. vol. 2.

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*Citation to Account.**

State of Indiana, }
Monroe county. }

The State of Indiana to John Stout:

Citation to account. By direction of the court of common pleas of said county, you are hereby cited to appear before said court, at the next term thereof (or instanter) and render an account of your proceedings in the administration of the estate of John Jones, deceased.

In witness, I have hereunto set my hand and affixed
[*Seal.*] the seal of said court, the —— day of ———.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Current Account of an Executor or Administrator.†

Account current. I, John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, swear that since the last term of the court of common pleas of Monroe county, I have received

Of ————, on note, ...	$1,000 00
Of ——— on account, ...	500 00
Total	$1,500 00

And that I have received no other money of the estate of said decedent, which I have not heretofore reported.

JOHN STOUT.

Subscribed and sworn to before me, the —— day of ———.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

List and notice of claims against an Estate.‡

Mr. John Stout,
Executor of the last will (or Administrator of the estate) of John Jones, deceased:

List and notice of claims. You are hereby notified that since the last term of our court of common pleas, the following claims have been filed against the estate of which you are executor (or administrator.)

By John Brown—note	$100 00
By Jacob Struble—account for goods	20 00
By Job Rule—coffin	10 00
By Joseph Little—physician's bill	55 00

Given under my hand, the ——— day of ———.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

* See sec. 106, p. 272, R. S. vol. 2. † See sec. 105, p. 272, R. S. vol. 2.
‡ See sec. 65, p. 261, R. S. vol. 2.

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Petition to settle as Insolvent.

State of Indiana, }
Monroe county. }

The undersigned, executor of the last will (or administrator of the estate) of John Jones, deceased, would represent to the court of common pleas, that the whole of the property of the decedent, real and personal, is insufficient to pay the debts of the estate; wherefore he asks for an order to settle it as insolvent. Petition of insolvency.

JOHN STOUT.

Subscribed and sworn to before me, the —— day of ——.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Notice of Insolvency.

At the —— term of the court of common pleas of Monroe county, the estate of John Jones, deceased, was declared probably insolvent. Creditors are therefore notified that the same will be settled accordingly. Notice of insolvency.

JOHN STOUT, *Ex'r (or Adm'r.)*

Dated ——— day of ———.

Statement of the Clerk of the disposition of the Funds of an Estate.

I, Milton McPhetridge, clerk of the court of common pleas of Monroe county, make the following statement of the funds of the estate of John Jones, deceased, so far as the same have come to my hands: Statement of clerk of disposition of funds.

RECEIPTS.

Received of the executor, John Stout, in all		$4,700 00
Paid to A. B. as per voucher No. 1....	$3,000 00	
Paid to John Stout, executor, for services as per voucher No. 2.....	50 00	
Paid to Peleg Popgun, attorney's fees as per voucher No. 3.....	25 00	
Paid to C. D., on his claim as per voucher No. 4.....	500 00	
Paid for Clerk's fees per order.....	25 00	
Paid to E. F., funeral expenses, as per voucher No. 5	10 00	
Paid for expenses of sale of property, as per voucher No. 6	10 00	
There is now remaining in my hands..	1,080 00	
Total paid out and on hands		$4,700 00

MILTON McPHETRIDGE, *Clerk.*

Signed the ——— day of ———.

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*Final Settlement Report.**

Final settlement report.

I, John Stout, executor of the last will (or administrator of the estate) of John Jones, deceased, report to the court of common pleas the following final settlement account:

[Whole amount of appraisements of real and personal property, as per inventories on file $5,500 00
Whole amount of sale bills of do 5,250 00

Difference between appraisements and sales ... $250 00]

	Debit.	*Credit.*
I am chargeable, per inventory of personal estate, with	$4,000 00	
Per inventory of real estate	1,500 00	
Interest accrued on notes taken at the sale of personal estate†		
Interest accrued on the notes taken on sale of real estate		
Interest accrued on all other claims in favor of estate		
I claim credit for difference between appraisements and sales by sales less than appraisements		$250 00
For goods taken by widow		250 00
For money paid into court Mar. 7, '52		500 00
" " " June 7, "		1,000 00
" " " Aug. 7, "		2,000 00
" " " Nov. 7, "		700 00
" " " Dec. 7, "		800 00
	$5,500 00	$5,500 00

All of which contains a full statement of all the estate of the decedent for which I am chargeable, with the credits to which I am entitled.

JOHN STOUT, *Ex'r, (or Admr.)*

Subscribed and sworn to before me, —— day of ——, 1852.

MILTON McPHETRIDGE,
Clerk of the Court of Common Pleas of Monroe County.

* Where money has been loaned by the executor or administrator, by order of the court, this form must be varied accordingly.

† The pamphlet edition of this act charges the sale bill to the administrator in accordance to the enrolled act, but incorrectly. It is omitted here.

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Notice of Distribution to Heirs.

Notice is hereby given, that at the ———— term of the court of common pleas of Monroe county, after final settlement of the estate of John Jones, deceased, five hundred dollars were found remaining for distribution among the heirs. Said heirs are therefore notified to appear at the next term of said court and receive their distributive share. Notice of distribution.

Affidavit of Widow that estate is not worth over $300.

State of Indiana, }
Monroe county. }

I, Mary Jones, widow of John Jones, deceased, swear that my late husband's property, real and personal, exclusive of incumbrances thereon, is not worth over three hundred dollars, as I believe, and I ask that the same be appraised. Affidavit of widow that estate is not worth over $300

MARY JONES.

Subscribed and sworn to before me, this —— day of ————.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Certificate to Widow.

I, Milton McPhetridge, clerk of the court of common pleas of Monroe county, hereby certify that, after due appraisement, the court being satisfied that the estate of John Jones, deceased, is not worth over three hundred dollars, have ordered the possession thereof to be given to the widow, Mary Jones. Certificate to widow.

In witness, I hereunto set my hand, and affix the seal [*Seal.*] of said court, the —— day of ————.

MILTON McPHETRIDGE,
C. C. C. P. Monroe county.

Sec. 195. There shall be printed of this act, in pamphlet form, one copy for each hundred inhabitants of the State, to be deposited in the office of the clerk of the proper courts in each county, in the same proportionate number; and every person appointed executor or administrator, shall by such clerk be furnished with a copy thereof, and shall pay to such clerk the sum of ten cents therefor; or any other person, for the same price, may procure a copy thereof; and such clerk shall pay over to the treasurer of his county all money so received, to be by him re-paid into the State treasury. Order for printing and distribution of this act.

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CHAPTER 11.

AN ACT prescribing who may make a will, the effect thereof, what may be devised, regulating the revocation, admission to probate, and contest thereof.

[APPROVED MAY 31, 1852.]

[*Who may make a will, the effect thereof, and what may be devised.*]

Who may devise.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. All persons, except infants and persons of unsound mind, may devise, by last will and testament, any interest descendable to their heirs, which they may have in any lands, tenements and hereditaments, or in any personal property, to any person or corporation capable of holding the same.

Devise, how construed.

SEC. 2. Every devise, in terms denoting the testator's intention to devise his entire interest in all his real or personal property, shall be construed to pass all of the estate in such property, including estates for the life of another, which he was entitled to devise at his death. A devise or bequest to a wife with a condition in restraint of marriage shall stand, but the condition shall be void.*

* A testator, commencing his will by expressing an intention to dispose of all his worldly estate, devised to his wife all his lands and tenements for life, together with all his household goods and chattels. If his wife married again, she was still to enjoy the real estate, but without power to dispose thereof except by leasing it for a term not exceeding one year at a time. If she married and died without issue, the real estate was to descend to a nephew of the testator; but if she had issue, the estate was to descend to such issue. The testator died, having made no further disposition of his property, and having no children. On a claim by the testator's brothers, his heirs at law, held, that all the personal estate, including moneys and obligations, passed by the will, to the widow.—*Lutz et al.* vs. *Lutz*, 2 Blackf. 72.

The construction of a will depends not so much upon any rigid principle of law, as upon what appears by the will to have been the testator's intention.—*Ibid.*

A will, after directing the personal estate to be sold, and the real estate leased until the rents, with the proceeds of the sale of the personal property, should be sufficient to pay the after-named legacies, contained the following provision: "I will and bequeath to my sister Isabel the sum of $50 annually, to be paid out of the rents of the place and the proceeds of the sale of my personal property, and continued until the following sums are paid." The will then gave several legacies and directed that, after their payment, the real estate should be sold, and distribution made.

Held, that in each year the $50 were to be paid to Isabel, before any payment to the other legatees.—*Parks* vs. *Perry*, 2 Blackf. 74.

A will is valid without being sealed, but it must be signed by the testator, and attested by two credible witnesses.—*Doe d. Knapp et ux.* vs. *Pattison et al.*, 2 Blackf. 355.

If land devised be afterwards sold by the devisor to a stranger, the devisee takes nothing by the devise.—*Raburn* vs. *Shortridge*, 2 Blackf. 480.

A purchaser of U. S. land, having a land office certificate therefor, (the patent not having issued) has a devisable interest in the land.—*Brockway et al.* vs. *Doe d. Nugent*, 5 Blackf. 110.

A person having such equitable interest, executed his will devising the land to A. The devisor afterwards received a patent for the land and died. Held, that the legal title to the premises by the will passed to the devisee.—*Ibid.*

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Wills—devises, how construed.

Devise as follows: "I give and bequeath to my wife C. all my estate, to be and remain hers as long as she remains my widow. . . . . My desire is for my son M. to have the land in W. county when he comes of age, if it remain in my widow's hands till that time." Held, that the widow's sale of the last named land during the son's minority, passed an interest in the same to the purchaser, which must defeat the son's claim to the land, at least while the widow remained unmarried.—*Doe d. Reese* vs. *Campbell*, 5 Blackf. 539.

See *Ryhn et ux.* vs. *Cockran*, 7 Blackf. 417.

The word heir is not necessary in a will of real estate, to convey the fee.—*Doe d. Franklin et al.* vs. *Harter et al.*, 7 Blackf. 488.

In a devise of land to A., the devisee was required, in consideration of the gift, to support his mother and the testator during their lives, and pay the funeral expenses "out of the proceeds of the farm on said land." Held, that the charge did not enlarge the devise to a fee by implication.—*Ibid.*

The charge cannot produce that effect unless the devisee may, by paying it, possibly sustain a loss unless he takes a fee.—*Ibid.*

The introductory clause in a will was, "As to such worldly estate as it has pleased God to intrust me with, I dispose of the same in the following manner," &c. The will also contained this clause: "And to effectuate this, my intention, I bequeath, &c.; and I also will and bequeath that P. F., my son, shall have the 80 acres of land whereon I now live," &c. Held, that P. F. took an estate in fee.—*Ibid.*

Bequest of the residue of personal estate as follows: "I give and bequeath unto the theological seminary at South Hanover, in the State of Indiana, all the remainder of my estate, to continue a permanent fund, and the interest to be applied to the education of pious, indigent youths who are preparing themselves for the ministry of the Gospel, and those only who strictly adhere to the Westminster confession of faith in its literal meaning." The said seminary, at the death of the testator, was an unincorporated association. Held, that the bequest was void at law, because the objects of the testator's legacy are too vaguely indicated to enable them to take the legacy without the interposition of a trustee, and because there was, at the death of the testator, no existing trustee capable of executing the trust intended to be created by the will.—*McCord* vs. *Ochiltree et al.*, 8 Blackf. 15.

Such a bequest, though void at law, will be enforced in equity as a charity, both in reference to the statute of 43 Elizabeth, and to the law of charities independently of that statute.—*Ibid.*

It was held that the following clause, "I will next, that all my estate, after my children are of age and the decease of my wife, shall be equally divided among my children," if unaffected by any other part of the instrument, would give to the wife a life estate by implication; but that no such implication could arise, when the property was disposed of by other parts of the will.—*Kelly et ux.* vs. *Stinson et al.*, 8 Blackf. 387.

In the construction of a will, the intention of a testator collected, not from any particular clause, but from the whole will, must govern.—*Ibid.*

A will must be construed according to the law in force when the testator died.—*Ibid.*

Any devisee or other person interested, may have the will proved.—*Stone* vs. *Huxford*, 8 Blackf. 452.

If an estate be devised on condition that the devisee will maintain the testator's widow during her life, and the devisee refuse to accept and perform the condition, the devise is void, and the heirs may enter.—*Ibid.*

A man resident in the State of New York died there leaving a will; but there was no evidence as to the contents of the will, or how it was executed. Held, that under these circumstances, a jury might find that the land of the deceased in this State, if he had any, descended to his legitimate children as his heirs.—*Stephenson* vs. *Doe d. Wait et al.*, 8 Blackf. 508.

When a will otherwise properly executed, refers to another paper already written, and so describes it as to have no doubt of its identity, such paper, it seems, makes part of the will, although the paper be not subscribed or even attached.—4 Comstock's N. Y. Rep. 140.

A contract to devise land cannot be specifically enforced; nor can a parol contract for the sale of land where possession has not been given. The bill in this case alleged that the complainant had advanced to his father 100 dollars, in consideration of which his father had agreed to devise said land to him;

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Wills—devises, how construed.

that the father did make a will devising said land according to agreement, but that the same was lost. There was no affidavit of the loss of the will. Bill dismissed on demurrer. Held, that there was no error in this.—*Stafford* vs. *Bartholomew et al.*, 2 Carter's Ind. Rep. 153.

A gift or other disposition by a testator, of property previously devised, is *pro tanto* a revocation of the will.—*Floyd* vs. *Floyd, &c.*, 7 Monroe's Rep. 291.

The declarations of a decedent tending to show that he had a will, (to repel the presumption of revocation,) though rejected by the New York courts, are admitted in Kentucky, though received with caution, and as corroborative, only, being in general the lowest species of evidence, and insufficient of themselves to establish a will, where there is not satisfactory evidence of a fraudulent suppression.—*Ibid*, 415.

Wills should be so construed as to carry out the intention of the testator so far as is consistent with the rules of law. If all its provisions cannot be sustained, it should be carried out so far as is consistent with law. A devise to be applied to the dissemination of the Gospel, at home and abroad, is valid, and the trustees should decide in the first instance, the mode of its appropriation. — *Atty. Gen.* vs. *Wallace's devisees*, 7 Monroe's Rep. 617.

The language used by the testator furnishes an appropriate and peculiar means of ascertaining his intention; but the terms used are to be understood according to the interpretation which such terms have received in judicial determinations on wills, unless the intention of the testator would be thereby violated. — *Danforth* vs. *Talbot's adm'r.*, 7 Monroe's Rep. 625.

Arguments and persuasions used by a testator's children to induce a devise to brother's or sister's children who are poor, is an influence worthily exerted, free from selfishness, and should not condemn a will. — Harrison's will, 1 Monroe's Rep. 352.

A testator may be aided by the views of others in coming to a just conclusion as to the manner of disposing his property by will, and the influence thereby exercised, unless it be an interested influence, cannot be deemed an undue influence.—*Ibid*, 353.

Parol and extrinsic evidence may be resorted to, as well as other provisions of the same will, to explain the intention of the testator. — *Haydon* vs. *Ewing's devisees*, 1 Monroe's Rep. 114.

In trials concerning the validity of a paper purporting to be a will, the admission of one of several devisees, obviously against his interest, is admissible as presumptive evidence, not as an admission by all concerned, but by one concerned against his interest, which would not have been made unless he believed it true. — *Beall et al.* vs. *Cunningham, &c.*, 1 Monroe's Rep. 401.

In a contest here, concerning the validity of a will, though the proof may show satisfactorily that another will was subsequently made, and lost or destroyed, this court will not order a substantial copy of the lost paper to be recorded, that question not having been contested in the inferior court, but will leave that subject for future contestation, as those interested may elect.—*Ibid*, 402.

The testator, in his will, says: "Whereas, my will is lengthy, and it is possible I may have committed some error or errors, I therefore authorize and empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention; whatever they determine is my intention, shall be final and conclusive, without any resort to a court of justice." Clauses of this description have always received such judicial construction as would comport with the reasonable intention of the testator.—*Pray et al.* vs. *Belt et al.* 1 Peters, 681.

If an unreasonable use be made of such a power so given in a will, one not foreseen, and which could not have been intended by the testator, it has been considered as a case in which the general power of courts of justice to decide on the rights of parties ought to be exercised.—*Ibid*, 680.

There cannot be such a construction given to such a clause in a testator's will, as will prevent a party who conceives himself injured by the construction, from submitting his case to a court of justice. A court must decide whether the construction of the will, adopted by those who are named, is the right construction, or the grossest injustice might be done.—*Ibid.*

The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail; although, in giving effect to it, some words should be reject-

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Wills—birth of a child—death of—of an unmarried woman.

Birth of a child deemed a revocation of a will, unless, &c.

SEC. 3. If after the making of a will, the testator shall have born to him legitimate issue who shall survive him, or shall have posthumous issue, then such will shall be deemed revoked, unless provision shall have been made in such will for such issue.

In case of the death of child, estate to descend according to will.

SEC. 4. But in case such child dies without issue, and the wife of such testator be living, the estate of the testator, except the wife's interest therein shall descend according to the terms of the will; and in case of the death of the wife, and also of the child, without issue, the whole of such estate shall descend as directed in the will, unless such child have a wife living at his death, in which case such wife shall hold such estate to her use so long as she remains unmarried.

Will of an unmarried woman revoked by marriage.

SEC. 5. After the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage.

Contract of conveyance not deemed a revocation.

SEC. 6. When any testator, after making his will, shall execute a contract for the conveyance of any property devised in such will, and any part of the purchase-money remains unpaid, such conveyance shall not be deemed a revo-

ed, or so restrained in their application, as to change their literal meaning in the particular instance.— *Finlay et al. vs. King's lessee*, 3 Peters, 346.

In the construction of ambiguous expressions, the situation of the parties may very properly be taken into view. The ties which connect the testator with his legatees, the affection subsisting between them, the motives which may reasonably be supposed to operate with him, and to influence him in the disposition of his property, are all entitled to consideration in expounding doubtful words, and ascertaining the meaning in which the testator used them. —*Smith* vs. *Bell*, 9 Peters, 68.

It is stated in many cases, that where there are two interests, inconsistent with each other, that which is primary will control that which is secondary.—*Ibid.*

The language of wills is not of universal interpretation, having the same import in all countries, and under all circumstances. They are supposed to speak the sense of the testator, according to the received laws and usages of the country where he is domiciled, by a sort of tacit reference to them, unless there is something in the language which repels or controls such a conclusion. In regard to personalty in an especial manner, the law of the place of the testator's domicil governs the distribution thereof, unless it is manifest that the testator had the laws of some other country in mind.—*Harrison* vs. *Nixon*, 9 Peters, 483.

No one can doubt if a testator, born and domiciled in England during his life, by his will give his personal estate to his heir at law, that the *descriptio personæ* would have reference to and be governed by the import of the terms, in the sense of the laws of England. The import of them might be very different if the testator were born and domiciled in France, Louisiana, Pennsylvania or Massachusetts.— *Ibid.*

In construing a will, the court must first look at the particular clause in question, at the same time taking into view the whole instrument, endeavoring to give meaning and effect to every clause of it.— *Gardner* vs. *Wagner*, Baldwin's C. C. R. 459.

Kent says: "That from Cheney's case (5 Co. 68,) down to this day, it has been a well settled rule, that parol evidence cannot be admitted to supply or contradict, enlarge or vary, the words of the will, nor to explain the intention of the testator, except in two specified cases: 1, where there is a latent ambiguity arising *dehors* the will as to the person or subject meant to be described; 2, and to rebut a resulting trust. It was held in 4 Dess. 215, (S. C.) that even the person who drew the will, could not be admitted to support a mistake in the will."

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cation, unless it shall appear from such contract to have been so intended; and a remedy for specific performance may be had against the devisees, by the persons entitled thereto, by virtue of the contract; and the purchase-money due on such contract, when recovered by the executor, shall be paid to the devisees.

Nor shall incumbrances be so deemed.

SEC. 7. An incumbrance upon any estate, shall not be deemed a revocation of any devise of such estate previously executed, but the devises and legacies relating thereto shall be subject to such incumbrance.

New estates in the same property to pass by the terms of the will.

SEC. 8. If, after having executed a will, devising any property, any testator shall make a conveyance of his interest therein, and shall take back a new estate therein, such new estate shall pass by his will to the person to whom the original estate or interest was devised, unless it shall appear from such will, or by the conveyance of his estate, or interest therein, or by the instrument by the force of which such new estate is taken back, that the testator intended that such conveyance should operate as a revocation of such devise.

The testator's interest, though altered after the will, shall pass.

SEC. 9. A conveyance, settlement, deed or other act of a testator, by which his estate or interest in property previously devised by him shall be altered, but not wholly divested, shall not be deemed a revocation of such devise; but the same shall pass to the devisee or legatee, the actual estate or interest of the testator, which would otherwise descend to his heirs; unless such devise shall be otherwise revoked, or unless in the instrument by which such alteration is made, the intention is declared that it shall operate as a revocation of such previous devise; but if, in any case, the provisions of the instrument by which such alteration is made, are wholly inconsistent with the terms and nature of such previous devise, such instrument shall operate as a revocation thereof, unless such provisions depend on a condition or contingency, and such condition be not performed, or such contingency do not happen.

Devisees to contribute alike to the payment of debts.

SEC. 10. When any estate, real or personal, that is devised, shall be taken, in whole or in part, from the devisee for the payment of the debts of the testator, all the other devisees shall contribute their respective portions of the loss to the person from whom the estate is taken, so as to make the loss fall equally on such devisees, according to the estimated value of the property received by each of them, unless the testator in his will, in making a specific devise, shall have virtually exempted any devisee from his liability for the payment of the debts with the others, or shall [have] by any provision in his will, required any appropriation of his estate, or any part of it, for the payment of his debts, different from that prescribed in this section, in which case the estate shall be applied in conformity with the provisions of the will.

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Wills—devises, how construed.

Undivided real estate first chargeable with the debts.

SEC. 11. Whenever any part of the real estate of a testator is left undevised, by his will, and his personal estate shall be insufficient for the payment of his debts, the undevised real estate shall be first chargeable with debts, in exoneration, as far as it will go, of the real estate that is devised, unless it shall appear from the will that a different disposition of the assets for the payment of his debts was made by the testator, when they shall, for that purpose, be disposed of in conformity with the provisions of the will.

Liability for debts not to be affected.

SEC. 12. Nothing herein contained, shall, in any way, affect the liability of the estate of the testator for the payment of his debts.

When devisee dies in the lifetime of testator, having issue, devise to vest in his descendant.

SEC. 13. Whenever any estate, real or personal, shall be devised to any decedent of the testator, and such devisee shall die during the lifetime of the testator, leaving a descendant who shall survive such testator, such devise shall not lapse, but the property so devised shall vest in the surviving descendant of the devisee, as if such devisee had survived the testator, and died intestate.

Naming of an executor not to discharge debts against him.

SEC. 14. The naming of any executor in a will, shall not operate as a discharge of any just claim which the testator had against such executor, but the same shall be settled according to law.

How incumbrance upon real estate in certain case, when there is a will, shall be removed.

SEC. 15. Whenever any person shall have devised his estate, or any part thereof, and any of his real estate subject to a mortgage, executed by such testator, shall descend to an heir, or pass to a devisee, and no specific direction is given in the will for the payment of such mortgage, the same shall be discharged as follows:

First. If such testator shall have charged any particular part of his estate, real or personal, with the payment of his debts, such mortgage shall be considered a part of such debts.

Second. If the will contains no direction as to what part of his estate shall be taken for the payment of his debts, and any part of his personal estate shall be unbequeathed or undisposed of by his will, such mortgage shall be included among his debts, to be discharged out of such estate unbequeathed, or undisposed of.

The discharge of any demand only a specific bequest.

SEC. 16. The discharge of any demand of the testator against any person, shall be construed only as a specific bequest of such demand, and the amount thereof shall be included in the inventory of the effects of the deceased, and, if necessary be applied to the payment of his debts, and, if not necessary for that purpose, shall be paid in the same manner as other specific legacies.

Title of real estate purchased of heirs not to be affected by devise unless it was proved and recorded.

SEC. 17. The title of any lands or interest therein purchased in good faith and for a valuable consideration, from the heirs at law of any person who shall have died seized of real estate, shall not be impaired by virtue of any devise made

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by such person of the real estate so purchased, unless the will or codicil containing such devise shall have been fully proved, and recorded in the office of the clerk of the court having jurisdiction, within three years after the death of the testator, except:

Exceptions.

First. Where the devisee shall have been within the age of twenty-one years, of unsound mind, imprisoned, or out of the State at the death of such testator; or,

Second. Where it shall appear that the existence of such will or codicil, shall have been concealed from, or unknown to such devisee:

In which cases, the limitation specified in this section shall not commence until after the expiration of one year from the time such disability shall have been removed or such will or codicil shall have come into the control of such devisee or his representative, or have been deposited in the clerk's office of the proper court of common pleas.

Execution and Probate of Wills.

Wills must be in writing, signed and attested.

SEC. 18. No will except a noncupative will shall affect any estate, unless it be in writing, signed by the testator, or or by some one in his presence, with his consent, and attested and subscribed in his presence by two or more competent witnesses; and if the witnesses are competent at the time of attesting, their subsequent incompetency shall not prevent the probate thereof.

Wills, how revoked.

SEC. 19. No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator or some other person in his presence, and by his direction with intent to revoke, shall destroy, or mutilate the same, or such testator shall execute other writing for that purpose, signed, subscribed and attested, as required in the preceding section. And if, after the making of any will, the testator shall execute a second, a revocation of the second shall not revive the first will, unless it shall appear by the terms of such revocation to have been his intent to revive it; or, unless after such revocation he shall duly republish the previous will.

Noncupative will.

SEC. 20. No noncupative will shall be valid when more than the value of one hundred dollars is bequeathed, nor unless it be made in the last sickness of the testator, and the subject thereof is reduced to writing within fifteen days after it shall have been declared and proved by two competent witnesses, who shall have heard the testator in effect request some of those present to bear witness thereto, and no such noncupative will shall be proved after six months from the death of the testator, nor until his widow and heirs shall have reasonable notice of the time and place of proving the same.

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Wills—execution and probate of.

Soldiers in actual service.

SEC. 21. Nothing contained in this article, shall prevent any soldier, in actual military service, nor any mariner, at sea, from disposing of his personal estate, in his actual possession, and his wages, by a noncupative will.

Probate of will.

SEC. 22. Upon the death of any testator, any person interested in any part of the estate specified in his will, may have such will proven in the court of common pleas, when in session, or before the clerk thereof in vacation.

Proof, when taken.

SEC. 23. Proof of last wills may be taken in any county,

First. Where the testator, immediately previous to his death, was an inhabitant of such county.

Second. When the testator not being an inhabitant of this State, shall die in such county, leaving assets therein.

Third. Where the testator, not being an inhabitant of this State, shall die out of this State, leaving assets in such county.

Fourth. Where a testator, not being an inhabitant of this State, shall die out of the State, not leaving assets in such county, but assets of such testator shall come into the county thereafter.

Witnesses.

SEC. 24. Witnesses may be summoned by subpœna, to be issued by the clerk of the court of common pleas, to appear and testify respecting the execution, subscribing, and attestation of such will.

Citation against the keeper of a will.

SEC. 25. On the application to such court of common pleas, of any person interested, the clerk thereof shall issue a citation to any person alleged to have the custody of any will, requiring such person to produce the same before such court, at such time as the court shall deem reasonable, that the same may be duly proven; and any person having, such will in his possession, who without just cause, shall after such citation, fail to produce such will, may be committed to the jail of the county, by an order of the court, there to remain until he produce such will, or shall be discharged by the further order of the court, and shall, moreover, be liable to any person interested in such will for the damages occasioned by withholding the same.

Not to be committed upon filing an affidavit, &c.

SEC. 26. The person alleged to have the custody of any will, shall not be committed to jail, if he file his affidavit that such will was never in his possession, or that he parted with its custody before the service of such citation, to some person, naming the person, without any intention to defeat or delay probate thereof.

Will to be proven before admitted to probate.

SEC. 27. Before a written will shall be admitted to probate or letters testamentary, or administration with the will annexed, shall be granted thereon, such will shall be proven by one or more of the subscribing witnesses, or if they be dead, out of the State, or have become incompetent from any cause

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since attesting such will, then by proof of the handwriting of the testator, or of the subscribing witnesses thereto.

When proof of handwriting is admissible.

SEC. 28. If none of the subscribing witnesses to a will be produced, their subsequent incompetency, death or absence from the State, shall be proven, before evidence of the handwriting of the testator, or of any of the subscribing witnesses, shall be received, and such evidence shall be taken in the same manner as on a trial at law.

Subscribing witness to a will interested, will void only as to him.

SEC. 29. If any person shall be a subscribing witness to the execution of any will in which any interest is passed to him, and such will cannot be proven without his testimony, or proof of his signature thereto as a witness, such will shall be void only as to him, and persons claiming under him; and he shall be compellable to testify respectiug the execution of such will, as if no such interest had been passed to him; but if he would otherwise have been entitled to a distributive share of the testator's estate, then so much of said estate as said witness would have been thus entitled to, not exceeding the value of such interest passed to him by such will, shall be saved to him.

Testimony to be written down, and it and the will recorded.

SEC. 30. If it shall appear from the proof taken, that the will was duly executed, the testator at the time of executing the same competent to devise his property, and not under coercion, such testimony shall be written down, subscribed by the witness examined, and attested by said clerk with his signature and seal of office; and the will with such testimony and attestation, shall be recorded by such clerk in a book kept for that purpose, and certified by him to be a complete record.

Certificate to be indorsed on will.

SEC. 31. Every will so proven, shall have a certificate indorsed thereon, or attached thereto, substantially stating that it has been admitted to probate; that a complete record of it and the testimony of the witnesses, has been duly recorded; the names of such witnesses, and the title and page of the book in which it is recorded, which certificate shall be attested by the signature of the clerk of such court, and his official seal.

Thus authenticated, may be read in evidence

SEC. 32. Every will so authenticated, or a complete copy of the record thereof, certified by the clerk in whose custody it may be, and attested by his signature and official seal, may be read in evidence without further proof.

Application may be made to court for probate.

SEC. 33. Upon the refusal of the clerk of the court of common pleas to admit a will to probate, application therefor may be made to said court.

Foreign Wills.

Foreign wills.

SEC. 34. Any written will that shall have been proven or allowed in any other of the United States, or in any foreign

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country, according to the laws of such State or country, may be received and recorded in this State, in the manner and for the purpose mentioned in the next two following sections.

Such wills, how authenticated.

SEC. 35. Such will shall be duly certified under the seal of the court or officer taking such proof; or, a copy of such will, and the probate thereof shall be duly certified under the seal of his court or office, by the clerk, prothonotary, or surrogate who has the custody or probate thereof, and such certificate shall be attested and certified to be authentic and by the proper officer, by the presiding or sole judge of the court, by whose clerk or prothonotary such certificate shall have been made, or if such will was admitted to probate before any officer, being his own clerk, his certificate of such will or record shall be attested and certified to be authentic, and by the proper officer, by the presiding or sole judge, chancellor, or vice-chancellor, of the court having supervision of the acts of such officer.

Such will to be filed and recorded.

SEC. 36. Such will or copy, and the probate thereof, may be produced by any person interested therein, to the court of common pleas of the county in which there is any estate, on which the will may operate, and if said court shall be satisfied that the instrument ought to be allowed as the last will of the deceased, such court shall order the same to be filed and recorded by the clerk; and thereupon such will shall have the same effect as if it had been originally admitted to probate, and recorded in this State.

Wills executed in this State and allowed in another.

SEC. 37. No will executed in this State, and proven or allowed in any other State or country, shall be admitted to probate within this State, unless executed according to the laws of this State.

Contesting the validity and Probate of Wills.

Contest of will.

SEC. 38. If, prior to the admission of any will to probate before the clerk of the court of common pleas, objection thereto, in writing, verified by his affidavit, alleging that the same is not made for vexation or delay, be filed by any person with such clerk, he shall continue the same until the succeeding term of the court, when, if the person contesting such will, fail to resist the probate thereof the judge of such court may admit such will to probate; but if such objection be made before such court, reasonable time shall be allowed to the party making the same to resist the probate of such will.

Complaint of contest.

SEC. 39. Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the court of common pleas of the county where the testator

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died, or where any part of his estate is, his allegation in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress, or was obtained by fraud, or any other valid objection to its validity, or the probate thereof; and the executor and all other persons beneficially interested therein, shall be made defendants thereto. *

After service or publication, court to hear and determine.

SEC. 40. After the service of citation upon such defendants, fourteen days before the hearing of such cause, or, upon

* That a testator was irrational upon some subjects, is not conclusive of his incapacity to make a will, if as to the disposition of his property he manifests rationality.—*James et al.* vs. *Langdon*, 7 Monroe's Rep. 198.

Instructions given on the trial of an issue as to the competency or incompetency of the testator to make a will, should not restrict the jury to inquiries involving memory alone, and not reason and knowledge of the natural obligation of relatives.—*Howard, &c.* vs. *Coke, &c.*, 7 Monroe's Rep. 657.

In such cases it is not proper to group a set of facts together and say that their existence or non-existence is conclusive of capacity or incapacity. The jury should be left to weigh all the facts proved which bear upon the question of capacity.—*Ibid*, 658.

To qualify one to make a will, it is not indispensable that such an one should have sufficient capacity to traffic with and manage property advantageously.—*Ibid*, 658.

The question is not so much what was the degree of memory possessed by the testator, as: Had he a *disposing* memory? Was he capable of recollecting the property he was about to bequeath — the manner of distributing it, and the objects of his bounty?—4 Wash. C. C. Rep. 262.

The only point of time to be looked at by the jury, at which the capacity of the testator is to be tested, is *that* when the will was executed.—*Ibid.*

The testator must, in the language of the law, be possessed of a sound and disposing mind and memory. He must have a memory. A man in whom this faculty is totally extinguished, cannot be said to possess understanding to any degree whatever or for any purpose. But his memory may be very imperfect, it may be greatly impaired by age or disease. He may not be able, at all times, to recollect the names, the persons, or the families of those with whom he is intimately acquainted—may at times ask idle questions, and repeat those he had before asked; and yet his understanding may be sufficiently sound for the ordinary transactions of life. He may not have strength of memory and vigor of intellect, to make and digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of; and there is probably no person who has not arranged such a disposition in his mind, before he committed it to writing.—4 Wash. C. C. Rep. 262.

When a paper was headed, "My last will and testament," &c., and the writing was blotted and blurred, interlineations crowded in, whole sentences obliterated, and entire passages cut off, crossed out and repeated, with material variations; and it appeared that the decedent had begun anew on a fresh leaf, an entirely new draught, varying from the preceding in essential particulars, and this was left unfinished, it was held that the paper did not contain sufficient intrinsic evidence of a testamentary intention.—3 Rawle, 15.

A man may be capable of making a will and yet incapable of making a contract, or to manage his estate. The question is, as to the competency when the will was made, though evidence of acts and sayings of the testator before that time will be admitted.—3 Wash. C. C. Rep. 580.

The declarations of the testator, before and at the time of making a will and afterwards, if so near as to be a part of the *res gestæ*, are admissible to show fraud in obtaining the will; but not declarations at any distance of time after the will has been executed, especially when the will has always been in the testator's possession.—1 Gallis C. C. R. 170.

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proof of the publication of notice made after the filing before said clerk of an affidavit of a disinterested person that the person so notified is not a resident of the State, or that his residence is unknown, such publication being made for three weeks successively in a weekly newspaper printed and published in the county, or, if none be published in such county, then in the county nearest thereto, thirty days before the hearing of the cause, the court may proceed to hear and determine such cause; and if any of the defendants thereto are minors, the court shall appoint guardians to take care of their interests in the controversy.

Other persons may contest.

SEC. 41. The final determination of such cause against the plaintiff, shall not debar any other person from contesting such will, within said three years.

Determination of the court.

SEC. 42. If such determination be against the validity of such will, or the competency of the proof, the court shall refuse or revoke the probate thereof; but, if it be in favor of the validity and due execution of such will, probate thereof shall be admitted or ratified.

Appeal.

SEC. 43. Any party aggrieved by the decision of such court, may appeal therefrom to the circuit court of the proper county, by filing with the clerk of the court of common pleas of such county, a bond, with sufficient sureties, to be approved by such clerk, in a penal sum double the amount of the costs accrued, and likely to accrue in such cause, and conditioned for the due prosecution of such appeal, and the payment of all the costs thereof, if judgment thereon be awarded against him.

Proceedings in the circuit court.

SEC. 44. Such circuit court may permit the parties in such appeal to bring additional parties before the court, to amend the proceedings, allegations and pleadings therein, and such cause shall be tried in the same manner as if it had been originally commenced in such circuit court.

Appeal or writ of error to sup. court.

SEC. 45. Any person affected by the proceedings of such courts may appeal or prosecute a writ of error to the supreme court from either, and may assign errors upon matters of fact and law.

Determination of sup. court.

SEC. 46. The determination of such supreme court, upon such writ of error, or upon such appeal, shall be certified back to the court from which the writ was prosecuted, or the appeal taken, with directions as to what orders the court shall make in the premises.

In case of infants, absentees, or of unsound mind.

SEC. 47. Infants, persons absent from the State, or of unsound mind, shall have two years after their disabilities are removed to contest the validity or due execution of such will.

Bond in case of contest.

SEC. 48. Before any proceedings shall be had on an application to contest a will after probate thereof, the person mak-

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ing the same, or some other person in his behalf shall file a bond, with sufficient sureties, in such amount as shall be approved by the clerk of such court of common pleas, conditioned for the due prosecution of such proceedings, and for the payment of all costs thereon, in case judgment be awarded against him.

Costs.

SEC. 49. If such cause be decided against the defendants therein, the court may make such orders as to the payment of the costs thereof, as it may deem just.

Notice of revocation to be served on executor, &c.

SEC. 50. Whenever the probate of any will shall be revoked as herein provided, the clerk of the proper court shall record such revocation in his record of wills and probate thereof, and attest the same; and shall cause a notice thereof to be served by the sheriff on the executors or administrators with the will annexed, if letters shall have been issued; and cause notice thereof to be published for three weeks successively in a newspaper printed in his county, if one shall be printed therein; and the expenses for the record, notice, service thereof, and publication, shall be taxed as a part of the costs of the proceedings against the party liable for the costs, under the determination of the court in which the same shall have been finally determined.

Lost or destroyed will.

SEC. 51. Whenever any will shall have been lost or destroyed, and the same shall have been established according to law, the decree of the court establishing such will shall be recorded in the proper book thereof, by the clerk of the proper court in which such will might have been proved if not lost or destroyed; and letters testamentary, or of administration with the will annexed, shall be issued thereon, in the same manner as upon wills duly proved before such court, or the clerk thereof, and letters of administration previously granted upon the same estate shall be revoked; but the court before which proceedings to contest the validity, due execution, or to prove such will, or to establish a lost or destroyed will, shall have authority to restrain the executor or administrator in the mean time acting, from any proceedings which it may judge injurious to the heirs or devisees of the deceased.

Restraining order.

SEC. 52. After the service of such restraining order, such administrator, executor, or administrator with the will annexed, shall suspend all proceedings in relation to the estate of the testator, except the collection and recovery of moneys, and the payment of debts, and the performance of such duties, in the disposal of the property of such estate, not inconsistent with the rights of the parties interested in such estate, whether the will in controversy or the probate thereof should be defeated or established, until a decision be had of such case.

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Wills—when lost—term "will" defined—guardian and ward.

Existence of will must be proved.

SEC. 53. No will of any testator shall be allowed to be proven and established as lost or destroyed, unless the same shall be proven to have been in existence at the time of the death of the testator; or be shown to have been destroyed in the lifetime of the testator without his consent or otherwise fraudulently disposed of; nor unless the provisions shall be clearly proven by two witnesses, or by a correct copy and the testimony of one witness.

Authority of the record, and copies thereof.

SEC. 54. The record of the testimony taken and recorded pursuant to the provisions of this act, and exemplifications of such record by the officer in whose custody the same may be, shall be received as evidence upon any controversy concerning any lands devised by such will, and shall be of the same force and effect upon the trial of such controversy, and may be rebutted, impeached and sustained in like manner, as if taken in open court, if the witnesses examined when probate was allowed, are dead, out of the State, or have become incompetent since the admission of such will to probate.

Term "will" defined.

SEC. 55. The term "will" as used in this act shall be construed to include all wills, testaments, codicils and supplemental wills.

To what wills this act to apply.

SEC. 56. The provisions of this act in relation to proof and probate of wills and the proceedings in respect to establishing or contesting the validity of any will, shall apply as well to wills made previous, as to those made subsequent, to the time when this act shall take effect.

Act not to impair previous wills.

SEC. 57. Nothing contained in the provisions of this act shall be construed to impair the validity of any will made before this act shall take effect, in conformity with any law in force at the time of the execution of such will.

CHAPTER 12.

AN ACT touching the relation of Guardian and Ward.

[APPROVED JUNE 9, 1852.]

Appointment.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, The court having probate jurisdiction in each county, in term time or the clerk thereof in vacation, shall appoint guardians of minors resident in such county, or having estate therein, and in case of conflict between two appointments in different counties, the one first made shall

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exclude all others, and extend to all the property of the ward within this State. *

When the minor is over 14 years of age.

SEC. 2. If the minor is over the age of fourteen years, such minor shall have the right to select a guardian, and if the person so selected shall be a suitable person, such person shall be appointed; but if such minor shall fail to select a suitable person, an appointment shall be made without reference to the wishes of such minor; such selection may be proved to the satisfaction of the court or clerk making the appointment without the personal attendance of such minor.†

SEC. 3. When a guardian has been appointed for any minor under the age of fourteen, such guardian shall not be removed when such minor arrives at the age of fourteen, except for good cause shown.

* *Letter of Guardianship.*

STATE OF INDIANA,
BROWN COUNTY.

I, William M. Mason, clerk of the court of common pleas of said county, certify that Sylvanus Manville, of said county, has been appointed guardian of the person and property of James Shields, minor son of John Shields, late of said county, deceased, and has qualified as such.

[SEAL.] In testimony whereof I have hereunto set my hand and seal the —— day of ———.

WILLIAM M. MASON, *Clerk.*

The relation of guardian and ward is nearly allied to that of parent and child. It applies to children during their minority, and may exist during the lives of the parents if the infant becomes vested with property; but it usually takes place on the death of the father, and the guardian is intended to supply his place.—2 Kent's Comm. 216.

An infant has a right to consider any person as his guardian, bailiff, or trustee, who enters upon his land and receives the proceeds, and may compel him to account for the same in a court of chancery.—*Grimes et al.* vs. *Wilson et ux.*, 4 Blackf. 331.

The guardian's trust is one of obligation and duty, and not of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust. If he settles a debt upon beneficial terms, or purchase it at a discount, the advantage is to accrue entirely to the infant's benefit.—2 Kent's Comm. 229.

† A., a female of about nine years of age, who was domiciled in Ohio, and whose parents were dead, was, against the will of her guardian there, brought into this State by B., who procured himself here to be appointed her guardian; the age of majority of a female being 18 in Ohio and 21 here. A. continued in this State until she was 18, and then made choice of it as her permanent home. Held, that A.'s domicil was thus changed from Ohio to this State, and that her age of majority then depended on the law here. Held, also, that she could not afterwards in this State, whilst she was under 21, appoint an attorney, or make a settlement with B., her guardian, which would be binding on her or her heirs.—*Hiestand et al.* vs. *Kuns*, 8 Blackf. 345.

The said B., after his said ward became domiciled here as aforesaid, and before she was twenty-one, was instrumental in the sale of her real estate for her in Ohio, the proceeds of which he received and brought into this State. Held, that he was chargeable, as guardian of A., for said proceeds; and that his payment of them to her before she was twenty-one, would not excuse him from accounting here for the same to the proper authority.—*Ibid.*

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Guardian and ward—statement of ward's estate—bond.

Statement of ward's estate, and bond.

SEC. 4. Before any person shall be appointed guardian of any minor, he shall file in the office of the clerk of the court having such appointment to make, a statement in writing of the whole estate of said minor and the probable value thereof, and shall verify the same by affidavit, and shall give bond with freehold surety, payable to the State of Indiana, in a penalty double such amount, conditioned for the faithful discharge of his duties as such guardian; to be approved by the clerk or court making such appointment and shall also take an oath that he will faithfully and honestly discharge the duties devolving on him as such guardian. *

* A ward may sue his guardian on his bond without first establishing claims against the latter in his trust capacity.—*State on rel., &c.* vs. *Strange*, 1 Carter's Ind. Rep. 538.

A settlement by a guardian with the probate court, after his removal, may be given in evidence in a suit against him by his ward, and is *prima facie* correct.—*Ibid.*

See *Hunt* vs. *White*, 1 Carter's Ind. Rep. 105, and the opinion there given overruled in the case of *The State on the rel. of Shannon* vs. *Strange*, 1 Carter's Ind. Rep. 538.

A declaration in a suit on a guardian's bond alleged that the defendant had failed to pay over certain money to his ward, after he had arrived at full age. Held, that a plea that the defendant had lent the money, &c., should show that the loan was authorized by the probate court.—*Cottingham* vs. *The State*, 7 Blackf. 405.

The general rule is, in case of a guardianship, that the ward must be of age before he can require his guardian to account; yet, in chancery, a ward may call such guardian to account if any thing should occur which makes it necessary. An infant after his guardian's death, has a right to compel a settlement of his accounts as if he were of age, the guardian's trust being personal and terminating at his death.—*Peck et al.* vs. *Braman et al.*, 2 Blackf. 141.

Form of statement of Ward's Estate.

STATE OF INDIANA,
BROWN COUNTY. }

The undersigned, guardian of the person and property of James Shields, minor heir of John Shields, deceased, would represent that the whole estate of said minor consists of personal property as follows, [here describe it,] probably worth - - - - - - - - - $500 00

Also, the following real estate, situate in said county, [here describe it,] probably worth - - - - - - - - - 2000 00

Amounting in all to - - - - - - - $2,500 00

SYLVANUS MANVILLE.

Subscribed and sworn to before me, (or in open court) the ——— day of ———.

WILLIAM M. MASON, *Clerk C. C. P. B. Co.*

Form of Bond.

We, Sylvanus Manville and Louis Prosser, are bound unto the State of Indiana, in the sum of five thousand dollars, for the payment of which, we bind ourselves, jointly and severally, firmly by these presents. Sealed and dated this the ——— day of ———.

If the above bound Sylvanus Manville will faithfully discharge his duties as guardian of the person and property of James Shields, minor heir of John Shields, deceased, then the above obligation is to be void, else to remain in force.

SYLVANUS MANVILLE, [SEAL.]
LOUIS PROSSER, [SEAL.]

Approved by me, (or in open court,) the ——— day of ———.

WILLIAM M. MASON, *Clerk of C. C. P. of B. Co.*

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Certain defects in bond, &c., disregarded.

SEC. 5. Such guardian's bond shall not be void on account of any informality, illegality, or defect, either formal or substantial, in the same, nor on account of any defect, informality, or illegality in the appointment of such guardian; but shall have the same force and effect as if such appointment had been legally made, and such bond legally executed.

Custody of ward.

SEC. 6. Every guardian so appointed shall have the custody and tuition of such minor, and the management of such minor's estate during minority, unless sooner removed or discharged from such trust: *Provided*, that the father of such minor, or if there be no father, the mother, if suitable persons respectively, shall have the custody of the person and the control of the education of such minor. *

Proviso.

Guardian appointed by will to have preference.

SEC. 7. When a guardian has been appointed by will, by a father or mother of any child, such guardian shall be entitled to preference in appointments over all others without reference to his place of residence, or the choice of such minor, but his appointment, and duties and powers, shall in all other respects be governed by the law regulating guardians not appointed by will.

Guardian *ad litem*.

SEC. 8. All courts shall have power to appoint a guardian *ad litem* to defend the interests of any minor impleaded in any suit; and to permit any person as next friend to prosecute any suit in any minor's behalf.

Duty of guardian.

SEC. 9. It shall be the duty of every guardian of any minor:

First. To make out and file within three months after his appointment, a full inventory, verified by oath, of the real and personal estate of his ward, with the value of the same, and the value of the yearly rent of the real estate; and failing so to do, it shall be the duty of the proper court to remove him, and appoint a successor.

Second. To manage the estate for the best interest of his ward.

Third. To render on oath to the proper court an account of his receipts and expenditures as such guardian, verified by vouchers or proof at least once in every two years; and failing so to do, [he shall] receive no allowance for services, and be liable to his said ward on his bond for ten per cent. in damages on the whole amount of estate, both real and personal, in his hands belonging to such ward.

Fourth. At the expiration of his trust, fully to account for and pay over to the proper person, all of the estate of said ward remaining in his hands.

Fifth. To pay all just debts due from such ward, out of the estate in his hands, and collect all debts due such ward;

* See title "*Habeas Corpus*," R. S. vol. 2, p. 194, and notes. See *Hovey et ux. vs. Morris*, 7 Blackf. 559; also, R. S. Vol. 1, p. 363, sec. 2.

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and in case of doubtful debts, to compound the same, and appear for and defend, or cause to be defended, all suits against such ward.*

Sixth. When any ward has no father or mother, or such father or mother is unable, or fails to educate such ward, it shall be the duty of his guardian to provide for him such education as the amount of his estate may justify.

Investment of ward's estate.

SEC. 10. The proper court may, on application of a guardian, or of any other other person, said guardian having notice thereof, order and decree any change to be made in the investment of the estate of any ward, that may to such court seem advantageous to such estate.

Removal of guardian.

SEC. 11. The court, by whom or by whose clerk any guardian has been or may be appointed, may at any time remove such guardian, he having five days' notice thereof, for habitual drunkenness, neglect of his duties, incompetency, fraudulent conduct, removal from the county, or any other cause which, in the opinion of such court, renders it for the interest of the ward that such guardian should be removed.†

Marriage of female ward.

SEC. 12. The marriage of any female ward to a person of full age, shall operate as a legal discharge of her guardianship; and her guardian shall account to the husband of such ward in the same manner as if she had arrived at full age.

Suit on bond.

SEC. 13. Any bond given by any guardian, may be put in suit by any person entitled to the estate; and such suit shall be governed by the law regulating suits on the bonds of executors and administrators.‡

Sale of real estate.

SEC. 14. Whenever necessary for the education, support or payment of the just debts of any minor, or for the discharge of any liens on the real estate of such minor, or whenever the real estate of such minor is suffering unavoidable waste, or a better investment of the value thereof can be

* Assumpsit against a guardian. The declaration alleged that the defendant was indebted to the plaintiff for boarding ward at defendant's request. Pleas, 1st, general issue; 2d, no assets in his hands belonging to his wards; 3d, that he was not guardian when the accommodations sued for were furnished. Demurrer to the second and third pleas sustained, and judgment against defendant for 25 dollars, to be levied of the effects of the ward in his hands as guardian. Held, that the demurrer was rightly sustained, as the defendant was sued on his individual undertaking. Held, also, that the judgment should have been against the defendant personally.—*Clark* vs. *Casler*, 1 Carter's Ind. Rep. 243.

As to the authority of foreign guardians to sue in this State, see *Wade et al.* vs. *Fite*, 5 Blackf. 212.

See title "Decedents' Estates," R. S. Vol. 2, p. 297, 304, for forms of guardians' inventory and account-current.

† The probate court cannot remove a guardian, except in cases relating to the faithful performance of his trust, or to the sufficiency of the security given by him.—*Pickens* vs. *Clayton*, 7 Blackf. 321. See same point decided in the case of *Morgan* vs. *Anderson et ux.*, 5 Blackf. 503.

‡ See ante, R. S. vol. 2, p. 285.

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made, the proper court may, on the application of such guardian, order the same or a part thereof, to be sold.

Contents of application.

SEC. 15. Such application shall set forth specifically,

First. The value and character of all personal estate belonging to such ward that has come to the knowledge or possession of such guardian.

Second. The disposition made of such personal estate.

Third. The amount and condition of the ward's personal estate, if any, dependent upon the settlement of any estate, or the execution of any trust.

Fourth. The annual value of the real estate of the ward.

Fifth. The amount of rent received and the application thereof.

Sixth. The proposed manner of reinvesting the proceeds of the sale, if asked for that purpose.

Seventh. Each item of indebtedness, or the amount and character of the lien, if the sale is prayed for the liquidation thereof.

Eighth. The age of the ward, where and with whom residing.

Ninth. All other facts connected with the estate and condition of the ward necessary to enable the court to fully understand the same. If there is no personal estate belonging to such ward in possession, or expectancy, and none has come into the hands of such guardian, and no rents have been received, the fact shall be stated in the application.*

Appointment of appraisers.

SEC. 16. Upon such application being filed in writing, verified by the oath of the guardian, the court, if satisfied of the propriety of selling such real estate, shall appoint two freeholders of the county, to appraise said real estate.†

Appraisement.

SEC. 17. Said appraisers shall take an oath to truly and impartially appraise said premises at their fair cash value;

* The form for a petition to sell real estate, depending upon such a variety of circumstances, will, of course, have to be materially varied, in different cases. Hence, it is omitted here. The section itself, will suggest the necessary averments.

† *Form of certificate of appointment of Appraisers.*

STATE OF INDIANA,
BROWN COUNTY.

I, William M. Mason, clerk of the court of common pleas of said county, certify that Shadrach Chandler and William S. Roberts, of said county, have been appointed appraisers of lot No. 10, in the town of Nashville, in said county, part of the real estate of James Shields, minor heir of John Shields, deceased, by the court of common pleas of said county, and they are to report their appraisement at the next term thereof.

In witness, I have hereunto set my hand, the ——— day of ———.

WILLIAM M. MASON, *Clerk.*

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which oath shall be indorsed on the certificate of their appointment.*

Bond.

SEC. 18. Upon the appraisement of said real estate being filed in writing, signed by said appraisers, the court shall require such guardian to execute bond, with sufficient freehold sureties, payable to the State of Indiana, in double the appraised value of such real estate, with condition for the faithful discharge of his duties, and the faithful payment, and accounting for, of all moneys arising from such sale according to law.†

Order of sale.

SEC. 19. Upon such bond being filed and approved by the court, the court shall order the sale of such real estate, providing in the order for reasonable notice of such sale, the credits to be given for the payment of the purchase-money, and the mode of securing the same.‡

**Oath of Appraisers.*

STATE OF INDIANA, }
BROWN COUNTY. }

Personally appeared before me, a justice of the peace of said county, Shadrach Chandler and William S. Roberts, the within named appraisers, and were sworn truly and impartially to appraise the property in the within certificate mentioned.

SHADRACH CHANDLER.
WILLIAM S. ROBERTS,

Subscribed and sworn to before me, the ——— day of ———.

JAMES McILVAINE, [SEAL.]
Justice of the Peace.

†Report of Appraisers.

The undersigned, appointed to appraise lot No. 10, in the town of Nashville, Indiana, the property of James Shields, minor heir of John Shields, deceased, having been duly sworn, report that, after due examination of the premises, we are of opinion that said lot is worth $250.

SHADRACH CHANDLER,
Sept. 20, 1852. WILLIAM S. ROBERTS.

The form of the bond required by this section, is the same as that given in note to Sec. 4, of this act, up to the condition, which should be varied as follows:

"If the above bound Sylvanus Manville, will faithfully discharge his duties as guardian of the person and property of James Shields, minor heir of John Shields, deceased, in faithfully paying over and accounting for all moneys which may arise from the sale of lot No. 10, in the town of Nashville, in said State, the property of said minor, according to law, then this obligation is to be void, else to remain in force."

SYLVANUS MANVILLE, [SEAL.]
JOSEPH KELLY, [SEAL.]

Approved in open court, the ——— day of ———.

WILLIAM M. MASON, *Clerk.*

‡ See ante, R. S. vol. 2, p. 303, for form of notice.

A petition to the probate court for the sale of the real estate of certain minor heirs, though it purport to be by several persons as guardians of the minors, is, if otherwise unobjectionable, sufficient, *prima facie*, to give the court jurisdiction; and one of the minors cannot treat an order of sale made on such petition as void, because only one of the petitioners was, in fact, his guardian.—*Doe d. Græter* vs. *Wise*, 5 Blackf. 402.

The petition in such case, after showing the situation of the real estate of the minors, stated that their interest would be greatly promoted by a sale of the prop-

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Commissioners may be appointed.

SEC. 20. The court may empower such guardian to make sale of such real estate, or may appoint a commissioner or commissioners for that purpose.

Report of sale.

SEC. 21. At the term of the court next after such sale, such guardian or commissioner shall make report thereof to such court, and produce the proceeds of sale, and the notes or obligations, or other securities taken to secure the payment of the purchase money.*

Private sale.

SEC. 22. Whenever such real estate is ordered by the court to be sold at private sale, the same shall not be sold for less than its appraised value, and when ordered to be sold at public auction for not less than two thirds of its appraised value.

Confirmation of sale.

SEC. 23. The court in confirming such sale, and directing a conveyance, shall be governed by the law regulating the confirming of sales of real estate made by executors or administrators, and the making of conveyances on such sales.†

Partition.

SEC. 24. The guardian of any minor may join in, and assent to, a partition of the real estate of such minor under the direction of the court upon a petition for partition. ‡

Compensation.

SEC. 25. Every guardian shall be allowed, by the court settling his accounts, the amount of all his reasonable expenses incurred in the execution of his trust; and also such compensation for his services as the court shall deem reasonable.

Sureties in guardian's bond, how discharged.

SEC. 26. Sureties in the bond of any guardian may be discharged from future liability therein under the same rules

erty, and by a re-investment of the proceeds. Held, that the case was within the statute.—*Ibid.*

That the order of sale of the minor's property in such case was joint, does not affect the jurisdiction of the court.—*Ibid.*

The petition for such order showed a case within the statute, and the record stated that on due proof, &c., the order was made; but the evidence was not in the record. Held, that the court had jurisdiction.—*Ibid.*

That the property in such case was appraised at 400 dollars, and sold for 100 dollars is no objection to the validity of the sale.—*Ibid.*

The President of the United States having refused his assent to a sale, made under an order of the probate court, of a tract of land reserved for certain minors by an Indian treaty—the land being imperfectly described in the deed—it was held that the purchaser might, by a bill filed in said court, obtain a correct survey and conveyance of the land.—*Johns* vs. *De Rome*, 5 Blackf. 421.

* *Report of Sale.*

To the Court of Common Pleas of Brown County:

The undersigned, guardian of the person and property of James Shields, minor heir of John Shields, deceased, would report that pursuant to an order of said court, made at the —— term thereof, he sold on the —— day of ——, at public outcry, in the town of Nashville, in said county, lot No. 10 of said town, the property of said minor, to Francis A. Matheny, for the sum of $250, that being the highest and best bid therefor upon these terms: (Here state terms of sale.) SYLVANUS MANVILLE.

† See title "Decedents' Estates," R. S. Vol. 2, p. 270, 271, secs. 98, 99, 100, 101, and 102.

‡ See post, R. S. vol. 2, p. 331, sec. 14.

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Guardian and ward—partition—petition for—service and notice.

and regulations prescribed for the discharge of the sureties in the bond of executors and administrators, and all enactments on that subject shall apply to guardians and guardian's bonds and sureties.*

Act to be printed in pamphlet form.

SEC. 27. There shall be printed of this act in pamphlet form, one copy for each one hundred inhabitants of the State, to be deposited in the office of the clerk of the proper courts in each county in the same proportionate number, and every person appointed guardian, shall by such clerk be furnished with a copy thereof, and shall pay to such clerk the sum of ten cents therefor; and such clerk shall pay over to the treasurer of his county all money so received, to be by him repaid in the State Treasury.

* See title "Decedents' Estates," R. S. Vol. 2, p. 254.

When the surety of a guardian becomes dissatisfied, and applies to be discharged from further responsibility, and a further bond with additional surety is thereupon given for the performance of the condition of the former bond, the surety in the new bond is liable for the previous as well as subsequent defalcations of the guardian.—*Armstrong et al.* vs. *The State*, 7 Blackf. 81.

CHAPTER 13.

AN ACT concerning the Partition of Lands.

[APPROVED MAY 20, 1852.]

What tenants may be compelled to divide.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That all persons holding lands as joint tenants, or tenants in common, or tenants in coparcenary, may be compelled to divide the same in the manner provided in this act. †

Petition.

SEC. 2. Any such tenant may apply to the circuit court, or court having probate jurisdiction of the county in which the lands, or any part thereof may lie, by petition, setting forth a description of the premises, and the rights and titles therein of the parties interested.‡

Service of summons or publication of notice.

SEC. 3. On the filing of such petition, a summons to appear and answer thereto, shall be issued by the clerk, and served personally on each of said parties, if they shall be found; if not, by leaving a copy thereof at their last place of residence; or if any of them are non-residents of the State, or if in the

†See appendix, title "tenants in common" for an explanation of that and the tenancy in coparcenary; also ante, p. 174, R. S. vol. 2.

‡ A petition for partition of real estate should show the nature and extent of the interest of the petitioner in the land, and that he held it in common with the defendants, whose interests should be also stated, if known to the petitioner.—*Lease et al.* vs. *Carr*, 5 Blackf. 353.

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petition it is alleged that their names are unknown to the petitioner, and such non-residence or want of knowledge be verified by affidavit, or if it shall appear, by affidavit or by the return of the officer having such summons to serve, that the residence of such defendants is unknown, the clerk shall order notice of the pendency of such petition to be given for three weeks successively in some newspaper printed in such county, or if there be none, then in a newspaper printed in this State nearest thereto.

Service ten, or publication thirty, days before court.

SEC. 4. It appearing to the court that such summons has been served ten days before the first day of the term, and when publication as aforesaid is required, that the same has been made thirty days previous to such term, the court shall proceed to hear and determine such petition.

Pleadings.

SEC. 5. Any person interested in such estate, may appear and plead any matter tending to show that the petitioner ought not to have partition as prayed for; and the further pleadings shall be conducted as in actions at common law, until an issue in law or in fact shall be joined, which shall be determined as in other cases.

Amendments.

SEC. 6. Amendments of petition or pleadings may be made as in other suits at law, and on like terms; and new parties may be made, and the cause continued until they can be legally notified.

A person not named in the petition may appear and defend.

SEC. 7. If any person, not named in the petition, shall appear and plead as a defendant, or allege any title to any part of the premises, the petitioner may reply that such person has no estate in the premises, and may pray judgment if he shall be admitted to object to the petition; and the petitioner may likewise reply in answer to such plea, any other matter, in like manner as if he had not disputed such person's right to appear.

SEC. 8. If it shall appear that such person has no estate in the lands, the matter of his plea shall be no further inquired of.

Interlocutory judgment.

SEC. 9. If upon trial of any issue, or upon default, or by confession or consent of parties, it shall appear that partition ought to be made, the court shall award an interlocutory judgment that partition be made to parties who may desire the same, specifying therein the share assigned to each, and taking into consideration advancements to heirs of a person dying intestate; and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition.*

* To obtain an order for a partition of real estate, when the defendants make default, the applicant must show his title to the court, and prove that the defendants are owners in common with him of the premises.—*Shaw et al.* vs. *Parker*, 6 Blackf. 345. Same point decided in case of *Lease et al.* vs. *Carr*, 5 Blackf. 353.

The decree for partition should declare the petitioner's proportion of the land; and it should also establish the rights of the other parties in the same, unless it

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The intention of a testator to be respected.

SEC. 10. Such court shall not order or affirm partition of any real estate contrary to the intention of a testator, expressed in his will.

Appointment of commissioners.

SEC. 11. Upon judgment of partition, the court shall appoint three disinterested resident freeholders of the county in which such court is held, not of kin to any of the parties, who shall make partition of such lands, in pursuance of the judgment of the court.*

Oath.

SEC. 12. Before proceeding to discharge their duties, such commissioners shall take an oath faithfully to perform the duties of their trust, which oath, if taken in open court, shall be entered in their order book, and if not, shall be indorsed on the warrant issued to them to make such partition.

SEC. 13. Two or more persons may, if they choose, have their shares set off together.

Guardian may act, &c.

SEC. 14. In all proceedings under this act, guardians may act for their wards as their wards might have acted, being of age. †

Report of commissioners.

SEC. 15. The commissioners shall make to the court, and acknowledge in open court, their report, specifying by divisions, or by metes and bounds, each share.

Report and judgment to be recorded in a separate book.

SEC. 16. Such report, if confirmed by the court, shall be spread upon the order book, and judgment of partition be rendered accordingly. And such report and judgment shall also be recorded in a separate book, kept for that purpose.

appear that proof of their rights was not in the power of the petitioner.—*Lease et al.* vs. *Carr*, 5 Blackf. 353.

The commissioners in such case should be directed to divide the land according to the decree, and to deliver and assign each party his share.—*Ibid.*

The provisions of the statute regulating practice in chancery, that when the complainant does not know all the parties, he may proceed against those unknown as well as the others, is applicable.—*Ibid.*

Before the commissioner's report, in partition, was made and confirmed, the petitioners proved, to the satisfaction of the court, that the parties had, *prima facie*, a title to the premises described in the petition. Held, that if proof in the case (the defendants having appeared and no default being taken) of the title of the parties in the premises was necessary, it must be considered that such proof was not only given, but given in time.—*Amory et al.* vs. *Carpenter et al.*, 8 Blackf. 280.

The order for partition should ascertain and declare the respective proportions of the common owners, and direct the commissioners to make partition accordingly, and to assign and deliver to each his share.—*Shaw et al.* vs. *Parker*, 6 Blackf. 345.

Where there is a variance between the original petition for partition on file, and the entry on the order-book as to persons made parties to the petition, the latter must be taken as the authentic exposition of the facts.—*Doe ex dem. Hain* vs. *Smith*, 1 Carter's Ind. Rep. 451.

It is sufficient that the record state there was satisfactory evidence of the due service of process, or publication of notice.—*Ibid.*

*Division cannot be made of two tracts of land by means of one suit, unless the two tracts are each owned by the same person.—*Kitchen et al.* vs. *Sheets*, 1 Carter's Ind. Rep. 138.

Commissioners appointed to make partition cannot divide the land into town lots, and give a part thereof to the public for streets, without the defendant's consent.—*Ibid.*

†See ante, p. 328, sec. 24, R. S. vol. 2.

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Report may be set aside.

SEC. 17. The court, before confirmation, may set aside such return for good cause shown, and commit the duty of partition anew to the same, or other commissioners, to be appointed and qualified as aforesaid, whereupon the same proceedings shall be had as are before directed.

When land cannot be divided, sale may be ordered.

SEC. 18. When such commissioners shall report to the court, that the whole or part of the lands of which partition is demanded, cannot be divided without damage to the owners, the court, in its discretion, may order the whole, or such part of the premises, to be sold, at public or private sale, on such terms and conditions as it may prescribe: *Provided*, that, at public sale, such land shall sell for at least two-thirds of its appraised value, and, at private sale, at not less than its appraised value; to be ascertained as in cases of sales of land on execution. And if a part only be sold, the remainder may be partitioned, subject to the rules hereinbefore provided.

Partial partition.

SEC. 19. If under such partial partition, duly confirmed, the shares assigned be full shares, the residue reserved for sale shall be discharged from all title or claim of the parties so receiving assignment of their shares.

Commissioner to sell to file bond.

SEC. 20. Such sale shall be made by a commissioner to be appointed by the court, other than one of the commissioners to make partition; and such commissioner shall file bond payable to the State of Indiana in such penalty as the court may direct, conditioned for the faithful discharge of the duties of his trust.

Conveyance.

SEC. 21. Whenever it shall appear to the court that the purchase-money for the land sold has been duly paid, the court shall order such commissioner, or some other person, to execute conveyances to the purchaser, which shall bar all claim of such owners to said lands as effectually as if they themselves had executed the same.

Commissioners not to be purchasers.

SEC. 22. Commissioners to make partition, or to sell, shall not become purchasers of said land.

Proceeds of sale, how disposed.

SEC. 23. The moneys arising from such sale after payment of just costs and expenses, shall be paid by such commissioner to the persons entitled thereto, according to their respective shares, under the direction of the court.

Two commissioners may act.

SEC. 24. Any two of the persons named as commissioners to make partition may perform the duties required by this act; and vacancies may be filled by the court.

Successor to continue proceedings.

SEC. 25. The occurrence of a vacancy shall not invalidate the previous acts of the commissioners; and a successor shall take up and continue the proceedings, which shall be as valid as if the same had been done by the commissioners first appointed.

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Partition—compensation of commissioners—persons of unsound mind.

When proceedings not to abate.

SEC. 26. If any party to such partition die, the proceedings therein shall not abate, except as to him; nor shall the same abate as to him, if the heirs of such decedent are made parties instead, and such heirs may be made new parties.

Compensation of commissioners.

SEC. 27. Such court shall make such allowance to the commissioners for their services, and for surveying, marking, chaining, platting, and the execution of the necessary conveyances as to such court shall seem reasonable.

Costs.

SEC. 28. All costs and necessary expenses shall be awarded, and enforced in favor of those entitled thereto, against the partitioners, in such proportion against each as the court may determine.

Proceedings may be opened within a year.

SEC. 29. Upon showing sufficient cause any person not served with summons may, within one year after such partition is confirmed appear and open the proceedings and obtain a review thereof, and also any person of unsound mind or any infant whose guardian did not attend and approve such partition, may, within one year after the removal of his disability, have a review of such partition. *

* See 2 Carter's Ind. Rep. 17, 36, 363.

CHAPTER 14.

AN ACT defining who are persons of unsound mind, and authorizing the appointment of guardians for such persons; defining the powers and duties of such guardians; declaring void the contracts of persons of unsound mind, and providing for their restraint when necessary.

[APPROVED MAY 29, 1852.]

Who are persons of unsound mind.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, The words, "persons of unsound mind," as used in this act or any other statute of this State shall be taken to mean any idiot, non compos, lunatic, monomaniac, or distracted person. †

Information and trial of lunacy.

SEC. 2. Whenever any person shall by statement in writing, represent to the court having probate jurisdiction, in

† The opinion of a witness, not being a medical man, as to a person's insanity, is not admissible evidence, unless the facts on which it is based have come under his own observation, and unless he state those facts to the jury.—*Doe d. Sutton vs. Reagan et al.*, 5 Blackf. 217.

The insanity of a county treasurer, not shown to be incurable, will not authorize the permanent appointment of another person in his place. And an appointment in such case only during the insanity of the officer (supposing such an appointment can be made,) will cease on his recovery.—*State vs. Pidgeon*, 8 Blackf. 132. See Appendix, title "Insanity."

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any county, that any inhabitant of such county is a person of unsound mind and incapable of managing his own estate; such court shall cause such person to be produced in court, and shall cause an issue to be made by the clerk of such court, denying the facts set forth in such statement, which issue shall be tried by a jury to be empanneled under the direction of said court.

Guardian.

SEC. 3. If such jury shall find that such inhabitant is a person of unsound mind, such court shall appoint a guardian for such person, who shall have the custody of his person and the management of his estate, and before entering upon his duties as such, he shall give bond and security and take an oath as such guardian, in like manner as is required of the guardian of a minor; *Provided*, that if such insane person is a pauper, he shall be provided for under the laws regulating the relief of the poor, but if such person, being a pauper, shall be dangerous, if permitted to run at large, he shall be provided for under the regulations prescribed in section 12 of this act. *

Proviso.

When the presence of the accused may be dispensed with.

SEC. 4. If the court shall be satisfied that such person alleged to be of unsound mind cannot without injury to his health be produced in court, such personal appearance may be dispensed with.

Expenses of trial.

SEC. 5. Whenever a guardian shall be appointed for any person of unsound mind, he shall pay the expenses of such trial, but if the jury find that such person is not of unsound mind, then the court shall give judgment against the person making the complaint for the costs.

Guardian of a non-resident insane person.

SEC. 6. Whenever any person not an inhabitant of this State, but having property in this State, shall by inquest held and determined according to the laws of the State where such person may reside, be found to be a person of unsound mind; the court having probate jurisdiction in any county of this State, where any of such property may be found; may appoint a guardian for such person, who shall have the management of such person's estate in this State, and the guardianship so first granted shall exclude all others.

Temporary guardian may be appointed when property is going to waste.

SEC. 7. Whenever any person of unsound mind, shall be the owner of property in any county of the State, other than the one in which such person resides, (or being an inhabitant of another State,) upon satisfactory proof thereof, verified by oath or affirmation of at least two competent witnesses, that such person is believed to be incapable of transacting his or her business; and that such property is going to waste, or likely to go to waste; the court having probate jurisdiction in such county, shall appoint a guardian for such person, who shall have the management of such estate, until a guar-

* See R. S. vol. 1, p. 401.

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dian be legally appointed in the county where such person of unsound mind may reside, or until the same be restored.

Powers and duties of guardian.

SEC. 8. The same duties are required of, and the same powers granted to, guardians of persons of unsound mind as are required of, and granted to guardians of minors, so far as the same may be applicable.*

Duration of guardianship.

SEC. 9. Such guardianship shall terminate with the restoration to reason, or death of the ward.

How the return to sanity may be tried.

SEC. 10. Whenever it is alleged that such person of unsound mind has become of sound mind again, the fact may be tried and determined in the same manner as the allegation of the unsoundness of mind; and the expenses of such trial shall be paid by such guardian out of the estate of the ward.

Contracts to be void.

SEC. 11. Every contract, sale or conveyance of any person, while a person of unsound mind shall be void.†

When the insane person is dangerous if at large, provision for safe keeping to be made.

SEC. 12. If it shall appear to the court, that there is danger to the community in permitting such person of unsound mind to run at large, the court shall make such order for his safekeeping as may be necessary, and direct the expenses thereof to be paid out of the estate of such person, or if that be insufficient, or, necessary for the support of his family, then out of the county treasury.

* See ante, p. 324, R. S. vol. 2.

† The objection to a deed of conveyance on the ground of the grantor's insanity, is the proper subject of inquiry for a jury.—*Doe d. Sutton* vs. *Reagan et al.*, 5 Blackf. 217.

CHAPTER 15.

AN ACT concerning the Assignment of Judgments and Decrees.‡

[APPROVED MAY 13, 1852.]

Judgments and decrees assignable.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That judgments and decrees of a court of record, for the recovery of money, and judgments obtained before a justice of the peace, may be assigned by the plaintiff or complainant, and the assignees thereof successively, on, or attached to, the entry of such judgment or decree, and the assignment when attested by the clerk of the court, or such justice of the peace, shall vest the title to such judgment or decree in each assignee thereof successively.§

‡ See vol. 1, R. S., p. 379, and the decisions of the supreme court there collected.

§ See *Tuter* vs. *Abden*, 2 Carter's Ind. Rep. 183

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Payment before notice valid.

SEC. 2. Payments or satisfaction on such judgment or decree, to the assignor, shall be valid, if made before notice of assignment to the judgment-debtor, but not otherwise.*

Execution.

SEC. 3. In case of assignment, execution shall issue in the name of the original plaintiff or complainant, but shall be indorsed by the clerk or justice, to be for the use of the assignee.

Assignee may maintain action.

SEC. 4. Any action which the plaintiff or complainant in such judgment or decree might have thereon, may be maintained in the name of the assignee.†

Delivery bonds to be for the use, &c.

SEC. 5. Bonds for the delivery of property levied upon by virtue of such execution, shall be to the judgment-plaintiff, for the use of such assignee; and all suits and proceedings relating to such judgment or decree, or against any officer on his bond, for neglect of duty relating thereto, may be against or on relation, or for the use of such assignee, as the case may require.‡

*A payment by a debtor, or his replevin-sureties, to the original judgment-creditor, before notice of assignment, is valid.—2 Blackf. 235.

If a debtor pay his judgment creditor a sum equal to the judgment, and cause the judgment to be assigned as payment to another creditor, the judgment is not discharged, but continues valid in the hands of the assignee.—2 Blackf. 369.

A payment made by J. L., a judgment-debtor, on a note placed in the hands of R. as security for a debt due the latter, by J. H., the judgment-creditor, to T. H., to whom the judgment had been assigned, without notice of R.'s lien, is valid.—5 Blackf. 196.

†A judgment debtor and insolvent, having land on which the judgment was a lien. A bill was filed against the infant heirs by the assignee of the judgment, praying a sale of the land in payment. *Held*, courts of law and equity have concurrent jurisdiction. No final decree could be taken against the infants, without proof. If there is an administrator, he should be made a party; if there is none, the fact should be stated in the bill. The assignee might be made a party.—8 Blackf. 508.

‡An assignor of a judgment has no control of it, nor of an execution on it taken out by the assignee; and if the sheriff, with notice of the assignment, fail to discharge his duty relative to the execution, by order of the assignor, he is liable for the use of the assignee.—6 Blackf. 444.

CHAPTER 16.

AN ACT to exempt property from sale in certain cases.

[APPROVED FEBRUARY 17, 1852.]

Preamble

WHEREAS, The constitution of the State declares that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a

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Exemption of property from sale on execution.

reasonable amount of property from seizure or sale, for the payment of any debt or liability hereafter contracted" therefore:

What amount of property exempt.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That an amount of property not exceeding in value three hundred dollars, owned by any resident house holder, shall not be liable to sale on execution, or any other final process from a court, for any debt growing out of, or founded upon a contract, express or implied, after the fourth of July eighteen hundred and fifty-two. *

Real and personal.

SEC. 2. The property may be real or personal, or both as the debtor may elect.

Mortgage of property exempt, to be valid, must be acknowledged.

SEC. 3. No mortgage or sale of any real estate, exempted under the provisions of this act, shall be valid if executed by a married man, unless the deed be acknowledged by the wife in due form of law.

Liens.

SEC. 4. Such exemption shall not affect any laborer's or mechanic's liens, nor lien for purchase-money of real estate exempted under this act.

Appraisement.

SEC. 5. For the appraisement of any property to be exempted under the provisions of this act, two disinterested house holders of the neighborhood shall be chosen, one by the plaintiff, his agent or attorney, and one by the execution-debtor, and these two, in case of disagreement, shall select a third, and in case either party fails to select an appraiser, the same shall be selected by the officer holding the execution.

Schedule, and oath of appraisers.

SEC. 6. Such appraiser shall proceed forthwith to make a schedule of the real and personal property selected by the debtor, describing the real estate by metes and bounds, and the personal property by separate items, affixing to each the value they may agree upon, and they or a majority of them, shall affix to the schedule so made, on affidavit in substance as follows: "We the undersigned, swear that in our opinion, the above is a just cash valuation of the property therein described."

Schedule to be returned with process.

SEC. 7. Such schedule shall be delivered to the officer holding the execution or other process, and shall be by him

* If a constable, having levied an execution on the debtor's goods, refuse to permit him, he having a family, to retain $100 worth of the property exempt from execution, but sell the same on the execution, he may be sued in trespass. *Stephens et al. vs. Lawson*, 7 Blackf. 275.

The statute under which this decision was made provided for the exemption from sale on execution of 100 dollars' worth of personal property only.

If, between the times of the rendition of judgment and the issuing of execution, an execution-defendant fraudulently convey all his property to a third person, and it is afterwards levied on to satisfy the execution, he is not entitled to hold $125 worth of said property exempt from execution, neither can he, on the refusal of the officer to release to him a portion of the property to that amount, maintain trover therefor against said officer and execution-defendant.—*Mandove et al. vs. Burton*, 1 Carter's Ind. Rep. 39. See ante, p. 134, R. S. vol. 2.

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returned with such execution, or other process, and made part of such return.

Fee of appraiser.

SEC. 8. Each appraiser, for his services, shall be allowed the sum of fifty cents, to be paid by the execution-debtor.

Debtor to elect what kind of property he will claim.

SEC. 9. If any execution-debtor shall claim property as exempted by virtue of this act, he shall elect whether he will claim personal, or real property, or both, and shall designate the property so claimed.

If personal only, officer to set it apart, &c.

SEC. 10. If such claim include personal property only, the officer holding such execution shall cause the same to be appraised and set apart to the debtor, and shall proceed to sell such other property, if any, as may be liable to said writ, according to law.

Proceeding in case both real and personal are claimed.

SEC. 11. If any such claim include both personal and real property, the officer shall proceed to have such personal property valued, and shall set the same apart to the debtor; he shall then cause the real property claimed as aforesaid to be valued, and if the same, together with the personal property set apart, shall exceed three hundred dollars, the debtor shall, within sixty days thereafter, pay such excess or enough to satisfy the execution, and if he fail to do so, the officer shall proceed to sell the same as other lands are sold on execution, if his writ shall authorize the sale of real property, but in making such sale, he shall receive no bid therefor, unless it exceed the difference between three hundred dollars and the personal property so valued and set apart; and if he shall sell said property, he shall pay over to the debtor the amount of said difference, and apply so much of the remainder on the execution as shall satisfy the same, and the overplus, if any, shall be paid to the debtor or other party having the next right.

When real property only is claimed.

SEC. 12. If the claim include real property only, the same shall be valued, and if it exceed three hundred dollars, it shall be dealt with as is specified in respect to real property, in the last preceding section.

If real property is susceptible it must be divided so as to set apart home dwelling.

SEC. 13. In all cases in which real property is sought to be exempted from sale on execution, if said real property is susceptible of division by metes and bounds, without material injury thereto, it shall be so divided as to exempt the principal dwelling house, or homestead of the debtor.

Sale for taxes.

SEC. 14. Nothing in this act shall be considered as exempting any property from taxation or from sale for taxes.

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Statutes, how construed.

CHAPTER 17.

AN ACT in relation to the construction of Statutes and the definition of terms.

[APPROVED JUNE 18, 1852.]

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That the construction of all statutes of this State, shall be by the following rules, unless such construction be plainly repugnant to the intent of the Legislature, or of the context of the same statute. Rules of construction.

First. Words and phrases shall be taken in their plain, or ordinary, and usual sense. But technical words and phrases having a peculiar and appropriate meaning in law, shall be understood according to their technical import. Words and phrases.

Second. Words importing joint authority to three or more persons shall be construed as authority to a majority of such persons, unless otherwise declared in the law giving such authority. Joint authority.

Third. The word "highway" shall include county bridges, State and county roads, unless otherwise expressly provided. "Highway."

Fourth. The word "inhabitant" may be constred to mean a resident in any place. "Inhabitant."

Fifth. The word "month" shall mean a calendar month, and the word "year" shall mean a calendar year, unless otherwise expressed, and the word "year," be equivalent to the words "year of our Lord." "Month" and "year."

Sixth. The words "preceding," and "following," referring to sections in statutes, shall be understood as meaning the sections next preceding or next following that in which such words occur, unless some other section is designated. "Preceding" and "following."

Seventh. The word "State" applied to any one of the United States, shall include the District of Columbia and the several territories; and the words "United States" shall include the said District and territories. "State."

Eighth. The word "will" shall include the words "testament" and "codicil." "Will."

Ninth. The words "written" and "in writing," shall include printing, lithographing, or other mode of representing words and letters. But in all cases where the written signature of any person is required, the proper hand wr ting of such person or his mark shall be intended. "Written," and "in writing."

Tenth. When a statute requires an act to be done which by law an agent or deputy as well may do as the principal, such Act may be done by deputy

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requisition shall be satisfied by the performance of such act by an authorized agent or deputy.

Who an interested person.

Eleventh. When a person is required to be disinterested or indifferent in acting on any question, or matter affecting other parties, consanguinity or affinity within the sixth degree, inclusive, by the civil law rules, or within the degree of second cousin inclusive shall be deemed to disqualify such person from acting except by consent of parties. *

* The statutes of other States are not noticed by our courts, unless they be pleaded and proved.—*Elliott et al.* vs. *Ray*, 2 Blackf. 31. See also 4 Blackf. 52. If a statute be repealed, and the repealing act be afterwards repealed, the original act is revived.—*Wayman* vs. *Naylor*, 2 Blackf. 32. See *McGuire* vs. *Nowland*, 2 Blackf. 76.

Statutes enacted at the same session of the legislature, are taken to be *in pari materia*, and should receive a construction which would give effect to each if possible. But if each of them cannot have the same entire effect when taken in connection with the others that it would have if taken singly, they must be so construed as to give effect to what appears to have been the main intention of the legislature.—*State* vs. *Rackley*, 2 Blackf. 249.

A statute should be so construed that every part of it, if possible, may be operative.—*Hutchen et al.* vs. *Niblo*, 4 Blackf. 148.

If a statute of a private nature contain a clause declaring it a public act, it will be so recognized.—*Brook. In. Co.* vs. *Records*, 5 Blackf. 170.

Whenever a statute is repealed, the court, deriving its jurisdiction from the repealed statute, cannot proceed under it, even in suits pending at the time of the repeal, unless they are saved by a clause in the repealing act.—*Hunt et ux.* vs. *Jennings*, 5 Blackf. 195.

It is the duty of the court to decide in favor of the constitutionality of a statute unless its unconstitutionality is so obvious as to admit of no doubt.—*State* vs. *Cooper*, 5 Blackf. 258.

Penal statutes must be construed strictly.—*Vanhook* vs. *The State*, 5 Blackf. 450.

The legislature is the judge of the existence of an emergency demanding the passage of an act.—*Carpenter et al.* vs. *Montgomery*, 7 Blackf. 415.

A person indicted for an offense created by statute, cannot be convicted after a repeal of the statute, unless it contain a saving clause, &c.—*Taylor* vs. *The State*, 7 Blackf. 93.

An act prescribing the boundaries of a county, is a public act. A party has the right to the decision of the court as to the meaning of a statute applicable to his case, independently of a declaratory act passed while the suit is pending, to explain the first act.—*Stephenson* vs. *Doe d. Wait et al.*, 8 Blackf. 508.

See 6 Blackf. 581. Where two statutes are repugnant, the first is repealed by the last. Where a statute is repealed, it must be considered (except as to transactions passed and closed,) as if it had never existed.—*Ibid.*

The recitations in the preamble of a private statute, are admissible evidence; and uncontradicted or unqualified, may be *prima facie* evidence of the truth of the matters therein recited, as between the person for whose relief the statute was passed, and the State.—*State* vs. *Beard et al.*, 1 Carter's Ind. Rep. 460.

The suspension of a statute for a limited time, is not a repeal of it.—3 Dall. 365; 1 Cond. Rep. 165.

The intention of the legislature, when discovered, must prevail, any rule of construction, declared by previous acts, to the contrary notwithstanding.—*Ibid.*

The presumption must always be in favor of the validity of laws, if the contrary is not clearly demonstrated.—Washington, Justice, 4 Dall. 14; 1 Cond. Rep. 211.

In the construction of the statutes or local laws of a State, it is frequently necessary to recur to the history and situation of the country, in order to ascertain the reason as well as the meaning of them, to enable the court to apply with propriety the different rules for construing statutes.—1 Wheat. 116; 3 Cond. Rep. 508.

It is a general rule, in the construction of public statutes, that the word "may" is to be construed "must," in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. And

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SEC. 2. The foregoing rules of construction and definitions of terms shall be in addition to, and part of those adopted in the code of civil practice, and together with those shall apply to all statutes or acts of the legislature.

See civil code, sec. 797, p. 223.

in all cases, the construction should be such as carries into effect the true intent and meaning of the legislature.—1 Peters, 64.

In the construction of statutes, one part must be construed by another. In order to test the legislative intention, the whole statute must be inspected.—1 Brockenb. C. C. R. 162.

Penal laws must be construed strictly to bring the case within the definition of the law, but not so as to exclude a case within their ordinary acceptation.—1 Baldwin's C. C. R. 78.

Laws are construed strictly to save a right or avoid a penalty; and liberally to give a remedy or effect an object declared in the law.—*Whitney et al.* vs. *Emmett et al.*, 1 Baldwin's C. C. R. 316.

The provisions of a law which are merely directory, are not to be construed into conditions precedent.—*Ibid.*

The mercantile terms are to be taken in the sense intended, which is to be ascertained by the laws in *pari materia*.—1 Baldwin's C. C. R. 505.

The legislature must be presumed to use words in their known and ordinary signification, unless that sense be repelled by the context. "The common law," is constantly used in contradistinction to the statute law.—6 Peters, 102.

CHAPTER 18.

AN ACT supplemental to an act entitled "An act to revise, simplify and abridge the rules of Practice, Pleadings and Forms in civil cases in the Courts of this State."

[APPROVED JUNE 18, 1852.]

To Abridge the forms in civil and Criminal Actions.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That in all proceedings in civil and criminal actions, the following forms may be used, and are sufficient, in all cases where they are applicable, and in other cases forms may be used as nearly similar as the nature of the case will admit; but no pleading shall be deemed invalid for want of form, if it contain the substance required by law.

NO. 1.

*Complaint on a Note.**

——— CIRCUIT COURT.

A. B. complains of C. D., and says that the defendant, on the ——— day of———, by his note, a copy of which is

*See R. S. vol. 1, p. 379.

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filed herewith, promised to pay the plaintiff ——— dollars, which remain unpaid, and the plaintiff demands judgment for —— dollars.

A. B. (*or J. J. attorney for A. B.*)

NO. 2.

Indorsee against the Maker.

A. B. complains of C. D., and says that the defendant on the ——— day of ———, by his note, a copy of which is filed herewith, promised to pay E. F. ——— dollars who indorsed the note to the plaintiff, which remains unpaid, and the plaintiff demands judgment for ——— dollars.

NO. 3.

Indorsee against the Indorser, in case of Insolvency of the Maker.

A. B. complains of C. D., and says that E. F., on the ———day of ———, by his note, a copy whereof is filed herewith, promised to pay the defendant ——— dollars, who indorsed the note to the plaintiff, and when the note became due, E. F. was, and still is, wholly insolvent, having no property subject to execution, so that an action against him would have been unavailing, and the note yet remains unpaid, wherefore the plaintiff demands judgment for ——— dollars.

NO. 4.

Against the Assignor.

A. B. complains of C. D., and says that E. F., on the ——— day of ———, by his note, a copy of which is filed herewith, promised to pay to the defendant ———dollars, who indorsed the note to the plaintiff; and the plaintiff, in an action commenced on the ——— day of ———, recovered judgment against the said E. F. for ——— dollars, the sum due on the note, in the ——— circuit court, at the ——— term thereof, being the first term after the note became due: and on the ——— day of ———, the plaintiff sued out execution on the judgment, which was delivered to the sheriff to be executed, whereon the sheriff returned that no property of the said E. F. could be found, subject to execution, and the said note and judgment remain unpaid. The plaintiff demands judgment for ——— dollars.

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NO. 5.

Indorsee against maker and indorsers upon a note payable in Bank.

A. B. complains of C. D., E. F., E. H. and E. R., and says that C. D., on the ——— day of ———, by his note, a copy of which, and indorsements, are filed herewith, promised to pay E. F. or order, one thousand dollars; and that E. F. indorsed the note to E. H., who indorsed it to E. R., who indorsed it to the plaintiff, yet C. D. did not pay the note when it became due, upon presentation at the place where payable, of which the defendants had due notice. The said note still remains unpaid, and the plaintiff demands judgment for ——— dollars.

NO. 6.

On a promissory note where there are payments.

A. B. complains of C. D., and says that the defendant, on the —— day of ———, by his note, a copy of which is filed herewith, promised to pay A. B. ——— dollars; that defendant, on ——— paid ——— dollars on said note, and on —— he paid ——— dollars; that the residue thereof, and the interest, are yet due, wherefore he demands judgment for ——— dollars.

NO. 7.

For money paid by a surety.

A. B. complains of C. D., and says that on the —— day of ———, he paid to G. H. ——— dollars, on a note held by him on the plaintiff, as surety for the defendant, a copy of which note is filed herewith, which amount yet remains due and unpaid to the plaintiff, wherefore he demands judgment for ——— dollars.

NO. 8.

On an agreement in writing—specific performance, and damages for breaches.

A. B. complains of C. D., and says that on ———, the defendant executed, as did also the plaintiff, an agreement, a copy whereof is filed herewith; that the plaintiff duly performed all the conditions on his part; that the defendant has failed to perform the conditions on his part in this: [here state the breaches of the agreement.] The plaintiff asks that

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the defendant be compelled to perform his agreement in this: [here state the specific performance required;] and the plaintiff demands damages to the amount of ——— dollars, which he has sustained in the premises, and other proper relief.*

NO. 9.

To foreclose a Mortgage.

A. B. complains of C. D., and says that the defendant executed a mortgage conveying to the plaintiff the tract of land therein described, as security for the payment of a debt evidenced by a note, a copy of each of which is filed herewith, amounting to —— dollars, which yet remains unpaid: Wherefore he asks judgment for —— dollars and the foreclosure of the mortgage, and sale of the property, or so much thereof as may be necessary to pay his debt, and for other proper relief. †

NO. 10.

On an Account.

A. B. complains of C. D., and says that the defendant is indebted to him in the sum of ——— dollars, for personal property sold and delivered by the plaintiff to the defendant, the particulars of which are set forth in an account filed herewith, leaving due and unpaid the sum of ——— dollars, for which he demands judgment.

NO. 11.

For Goods sold and delivered, Materials furnished, and Money lent.

A. B. complains of C. D., and says that the defendant owes him ———dollars, for goods sold and delivered by plaintiff to him; also, that defendant owes plaintiff———dollars, for work done and materials furnished by plaintiff for him; also, that defendant owes plaintiff——— dollars, for money lent by plaintiff to him—a bill of particulars of each is filed herewith: wherefore plaintiff demands judgment for———dollars.

NO. 12.

For Fraud in the sale of Property.

A. B. complains of C. D., and says that on the———day of————, the defendant sold him a horse, for which the plaintiff paid him ——— dollars; that the defendant fraudulently represented the horse to be sound, knowing the same

* See ante, R. S. vol. 2, p. 176. † See ante, R. S. vol. 2, p. 213.

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to be unsound and diseased with the fistula, by reason whereof the horse has become worthless, and the plaintiff has been put to ——— dollars expense in keeping and trying to cure him: Wherefore, he prays judgment for ——— dollars damages.*

NO. 13.

To recover personal property.

A. B. says that he is the owner of, and entitled to the possession of [here describe the property;] of the value of——— dollars, which C. D. has possession of without right, and unlawfully detains from the plaintiff; wherefore he demands judgment for the recovery of the property, and ——— dollars damages for the detention, and other proper relief. †

NO. 14.

For injury to the Person.

A. B. complains of C. D., and says that on ————, the defendant being the owner of a stage coach, the plaintiff took passage therein at ————, to be conveyed to ———; that the stage was upset by the carelessness of the driver in the service of the defendant, and the plaintiff thereby had his arm broken, and was otherwise injured, in consequence of which he had to expend ——— dollars for medical attendance, and says he has sustained damage to the amount of——— dollars, for which he demands judgment. ‡

NO. 15.

For taking Goods.

A. B. complains of C. D., and says that, on————, at ————, the defendant without leave and wrongfully took the following property of the plaintiff and has not returned the same, that is to say [here describe the property with the value,] by which plaintiff says he was damaged to the amount of ——— dollars, for which he demands judgment, and for other proper relief.

* See appendix, title "Fraud." † See ante, p. 54, R. S. vol. 2.

‡ If recovery is desired for loss of time or medical attendance or other special damage, state the grounds thereof.

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NO. 16.

For Assault and Battery.

A. B. complains of C. D., and says that on———— the defendant assaulted and beat the plaintiff, whereby he is damaged to the amount of ——— dollars, for which he demands judgment.

NO. 17.

For Slander.

A. B. complains of C. D., and says that on ——— the defendant spoke the following false and slanderous words of the plaintiff, that is to say [here insert the words,] by which plaintiff says he is damaged to the amount of ——— dollars, for which he demands judgment. *

NO. 18.

For a Libel.

A. B. complains of C. D., and says that the defendant on ———, published in a newspaper called ——— of the plaintiff, the following false and malicious libel, [here insert it,] whereby the plaintiff is damaged to the amount of ——— dollars, for which he demands judgment.

NO. 19.

To recover real property.

A. B. states that he is the owner in fee simple, (or for life, &c.,) and entitled to possession of a tract of land, (or town lot,) [here describe it,] that C. D. now holds possession of the land without right, and for ——— past has unlawfully kept the plaintiff out of possession, wherefore he demands judgment for the recovery of the land, and ——— dollars damages for being kept out of possession, and for other proper relief.†

NO. 20.

For injury to land.

A. B. complains of C. D., and says that on ——— at ———, defendant, without leave, wrongfully entered on [describe the land] of which the plaintiff was then the owner; and defendant also cut timber thereon to the value of ——— dollars, and carried it away, by which plaintiff was damaged to the amount of ——— dollars, for which he demands judgment.

* See ante, p. 205, R. S. vol. 2. † See ante, p. 166, R. S. vol. 2.

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NO. 21.

*Demurrer.**

A. B. against C. D., ——— Circuit Court.

The defendant demurs to the complaint for the following grounds of objection:

First. ———————————————.

Second. ———————————————.

C. D., *Defendant, or*
E. F., *Agent or Attorney.*

NO. 22.

Answer.

A. B. against C. D., Answer.

The defendant admits that he made the note, and that it remains unpaid as alleged in the complaint, except the sum of ——— dollars, which he paid to the plaintiff on the ——— day of ———. And the defendant, by way of set-off says that when this action commenced, the plaintiff was, and still is, indebted to him in the sum of ——— dollars, upon a note (or contract or account) a copy of which is filed herewith; and the defendant offers to set off against the amount due to the plaintiff an amount equal thereto, and demands judgment for ——— dollars, the residue.†

NO. 23.

A. B. against C. D., Answer.

C. D., defendant, answers to the complaint, that he did not execute the note mentioned therein; or,

That he admits he executed the note, mentioned in the complaint, but on the ——— day of ———, he paid the same in full; or,

Admits he executed the note, and says that he has paid the same, except the sum of fifty dollars, and before this action was commenced he tendered to the plaintiff the sum of fifty dollars, and now brings the same into court for the plaintiff.

NO. 24.

Accord and Satisfaction.

The defendant answering, says he admits the execution of

* See ante p. 38, R. S. vol. 2. † See ante p. 39, R. S. vol. 2.

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the note, and that before the commencement of this action, he delivered to the plaintiff one wagon, which he received in full satisfaction of the note mentioned in the complaint.

NO. 25.

Former Recovery.

The defendant answering, says that at the ——— term of the ——— circuit court, the plaintiff recovered judgment against the defendant for ——— dollars damages, and ——— dollars for costs; and that said judgment was rendered upon the same cause of action mentioned in the plaintiff's complaint.

NO. 26.

Release.

The defendant answering, says the plaintiff executed to him a release, a copy of which is filed herewith, whereby he discharged the defendant from the cause of action mentioned in the complaint.

NO. 27.

Statute of Limitations to an Account.

The defendant answering, says that the cause of action mentioned in the plaintiff's complaint did not accrue within six years before the commencement of this action.*

NO. 28.

Minority.

Defendant answers to the note mentioned in the third clause of action, and says that at the time of its execution, he was a minor under the age of twenty-one years.

NO. 29.

Trespass upon real property.

Defendant answers, and says that a part of the land mentioned in the plaintiff's complaint was the soil and freehold of the defendant, the same being described as follows: [here describe it,] and denies that he entered on any part of said land, except the part above described.

* See ante p. 75, R. S. vol. 2.

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NO. 30.

Deceit in sale of a Horse.

The defendant answers, and says he admits he sold the horse to the plaintiff for the price stated in the complaint, but denies that he made said representation, knowing that the same was not true. And further denies that said horse was unsound, as stated in the plaintiff's complaint.

NO. 31.

Slander.

The defendant answers and says he denies that he charged the plaintiff with the crime of perjury, as set forth in the plaintiff's first cause of action; admits he spoke the words mentioned in the second cause of action, but says that on ——— at ——— the plaintiff did feloniously steal and carry away one rifle gun, the property of C. D., of the value of ——— dollars, so the defendant's charge was true.*

NO. 32.

Assault and Battery.

Defendant answers and says the plaintiff first assaulted him, and he only defended himself. †

NO. 33.

For Recovery of Real Property.

The defendant denies that the plaintiff has any other ownership of, or title to, the premises in question than as hereinafter set forth, and admits that he is in possession of the premises, but denies that such possession is wrongful. And by way of counter-claim, says that the plaintiff was on the ——— day of ——— the owner of said land and now has the legal title thereto, but on that day the plaintiff by his written contract, a copy of which is filed herewith, sold and agreed to convey the land to the defendant on the terms therein specified, and put the defendant in possession thereof as purchaser; and the defendant performed all the conditions on his part in said contract, and before the commencement of this action tendered to the plaintiff, and now brings into court ——— dollars, the full amount due to him as the price of said land; wherefore he prays judgment that the plaintiff convey to him the land, and that his title be quieted.‡

* See ante p. 346, R. S. vol. 2. † See ante p. 346, R. S. vol. 2.
‡ See ante p. 346, R. S. vol. 2.

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NO. 34.

Reply.

A. B. against C. D.

The plaintiff admits that he made the contract, and put the defendant in possession as stated in the answer, but afterwards, on ——— the plaintiff and defendant rescinded said contract by a written agreement, a copy of which is filed herewith, and the defendant then agreed to restore to the plaintiff the possession of the lands on the ——— day of ———, which the defendant has failed to do.

NO. 35.

Limitations in an action on an account.

The plaintiff replies and says that after the expiration of six years, and before the commencement of this action, the defendant executed a writing, a copy whereof is filed herewith, by which he acknowledged said debt, and agreed to pay the same. *

NO. 36.

Minority.

The plaintiff replies that the articles mentioned in his bill of particulars were necessaries for the defendant and suitable to his condition in life.†

NO 37.

Summons.

The State of Indiana: To the sheriff of ——— county:

You are commanded to summon C. D. to appear in the ——— circuit court, on the second day of the next term thereof to answer the complaint of A. B., and of this summons make due return. Witness the clerk and seal of the court this ——— day of ———.

E. F., *Clerk.* [L. S.]

NO. 38.

Subpœna.

The State of Indiana: To the sheriff of ——— county:

Summon A. B. to appear in the ——— court, on the ——— day of ———, 18—, to testify in an action wherein C. D. is plaintiff, (or defendant) and return this summons. Witness this ——— day of ———, 18—.

E. F. *Clerk.*

* See ante, p. 348, R. S. vol. 2.

† See ante, p. 348, R. S. vol. 2.

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NO. 39.

Affidavit in Attachment.

A. B. against C. D., ——— circuit court.

The plaintiff says that the claim in this action against the defendant is for money due on a note, executed by him to the plaintiff; that the claim is just, and that he believes he ought to recover five hundred dollars, and that the said C. D. has left this State with intent to defraud his creditors, [or any of the other causes of arrest.] Sworn to this ——— day of ———, 18—, before me.*

NO. 40.

Affidavit for Claim and Delivery of Personal Property.

A. B. against C. D., ——— circuit court.

The plaintiff states that he is the owner and lawfully entitled to the possession of the following property, viz: [here describe the property,] of the value of ————; that the same has not been taken for any tax, assessment or fine, pursuant to any statute, nor seized under an execution or attachment against the property of the plaintiff, but is unlawfully detained in the county of ———, from the plaintiff by the defendant.

A. B.

Sworn to by A. B. before me this —— day of —— 18—.†

NO. 41.

Affidavit for Bail.

A. B. against C. D., ——— circuit court.

The plaintiff says that the defendant is indebted to him in the sum of one hundred dollars now due on a note executed by the defendant to the plaintiff on the ——— day of ———, upon which note this action is brought to recover that sum, and he believes that the defendant is about to leave this State, taking with him property subject to execution, (or money or effects,) which should be applied to the payment of the said debt, with intent to defraud the plaintiff.

Sworn to this ——— day of ———, 18—, before me.‡

NO. 42.

Undertaking for Costs.

A. B. Against C. D. ——— circuit court.

We undertake that the plaintiff shall pay to the defendant all costs that may accrue in this action to any officer or person

E. F.

(Date) G. H.

*See ante, p. 62, R. S. vol. 2. †See ante, p. 54, R. S. vol. 2. ‡See p. 50 R. S. vol. 2.

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NO. 43.

*Special Bail.**

I, A. B., acknowledge myself special bail for the within named ——— ———, in the action specified in the within order of arrest. Witness my hand this —— day of ———, 18—.

A. B.

Taken and approved by me this —— day of ———, 18—.

E. F., *Sheriff.*

NO. 44.

Undertaking of Plaintiff to obtain Attachment. †

A. B. against C. D., ——— Circuit Court.

We undertake that the plaintiff shall duly prosecute his proceeding in attachment in this action and pay to the defendant all damages which he may sustain if the proceedings of the plaintiff shall be wrongful and oppressive.

C. P.

Approved by ———. R. S.

NO. 45.

Undertaking of the Plaintiff to obtain Delivery of Personal Property.‡

A. B. against C. D., ——— Circuit Court.

We undertake that the plaintiff, A. B., shall prosecute this action with effect and without delay, and return the property in controversy to the defendant, if a return be adjudged by the court, and pay to him all such sums of money as he may recover against the plaintiff in this action for any cause whatever.

Approved by ———. A. B.

(Date.) C. D.

NO. 46.

Undertaking to obtain Injunction.‖

A. B. against C. D., ——— Circuit Court.

We undertake that the plaintiff, A. B., shall pay to the defendant, C. D., all damages and costs which may accrue by reason of the injunction in this action. G. H.

This —— day of ———, 18—. I. J.

*See ante, p. 51, R. S. vol. 2.

†See ante, p. 64, R. S. vol. 2.

‡See ante, p. 57, R. S. vol. 2.

‖See ante, p. 60, R. S. vol. 2.

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Forms—orders—of arrest—of attachment—for delivery of property.

NO. 47.

*Order of Arrest.**

The State of Indiana: To the sheriff of ——— county:

You are commanded forthwith to arrest C. D., and hold him to bail in the sum of ——— dollars, claimed by A. B. in an action brought in the ——— circuit court by A. B. against him, together with the costs of the action, and to return this order on the ——— day of ———, or, if a recognizance is taken, then forthwith.

Witness, the clerk of the ——— circuit court, this ——— day of ———. E. F., *Clerk.*

NO. 48.

Order of Attachment.†

A. B. against C. D., ——— Circuit Court.

The State of Indiana: To the sheriff of ——— county:

You are commanded to seize and take into your possession the personal property, and attach the land of the defendant in your county, not exempt from execution, or so much thereof as will satisfy the claim of the plaintiff in this action for five hundred dollars, together with the costs of the action, and return this order, with your proceedings thereon, when fully executed or discharged.

Witness, the clerk of said court, this —— day of ———, 18—. E. F., *Clerk.*

NO. 49.

Order for the delivery of Property.‡

A. B. against C. D., ——— Circuit Court.

The State of Indiana: To the sheriff of ——— county:

You are commanded to take the following property, viz: [here describe it, and state its value, as in the affidavit,] from the defendant, C. D., and deliver it to the plaintiff, A. B., upon his giving the undertaking and surety required by law; and make due return of your doings on this order forthwith.

Witness, the clerk of said court, this —— day of ———, 18—. E. F., *Clerk.*

* See ante, R. S. vol. 2, p. 51. † See ante, R. S. vol. 2, p. 64.

‡ See ante, R. S. vol. 2, p. 51.

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NO. 50.

*Order of Injunction.**

A. B. against C. D., ——— Circuit Court.

The State of Indiana: To C. D.:

You are enjoined from all further proceedings upon the judgment of the ——— circuit court, rendered at the —— term thereof, in 18—, in your favor, against A. B., for the sum of —— dollars, and costs, until the further order of this court.

By order of the court, this —— day of ———, 18—.

Witness: E. F., *Clerk.*

NO. 51.

Executions.†

The State of Indiana: To the sheriff of ——— county:

Whereas, A. B. recovered judgment against C. D. on the —— day of ———, in the ——— court for ——— dollars, [and E. F. became replevin-bail therefor on the —— day of ———,] upon which there is due ——— dollars principal and interest, and ——— dollars costs accrued to this time. You are therefore commanded to levy the said sums of money of the property of the defendant [and replevin-bail] in your county, subject to execution, and have the money at the clerk's office to satisfy said judgment, interest and costs, and return this writ in one hundred and eighty days, with your doings thereon.

Witness, &c.

NO. 52.

Delivery of Property.‡

The State of Indiana: To the sheriff of ——— county:

Whereas, on the —— day of ———, by the judgment of ——— circuit court, A. B. recovered against C. D. the following personal (or real) property, viz: [here describe it,] which is unjustly withheld from the said A. B. by the said C. D. You are therefore commanded forthwith to deliver to said A. B. possession of said premises with appurtenances, (if real property,) (if personal, said property,) so recovered, and that of the property of said C. D. in your county, you levy ——— damages and ——— costs recovered in said judgment by A. B. against C. D. and have the money at the clerk's office to satisfy said damages and costs, and return

* See ante, R. S. vol, 2, p. 60. † See ante, R. S. vol. 2, p. 128.

‡ See ante, R. S. vol. 2, p. 57.

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this writ in one hundrded and eighty days with your doings thereon.

Witness the clerk and seal of said court this —— day of ———. E. F., *Clerk.*

NO. 53.*

Schedule to be furnished by the Sheriff, and Appraisement.

A. B. against C. D., ——— Circuit Court.

The following is a list of property levied upon by virtue of an execution in this case by me, on this ——— day of ———, 18—. Q. R., *Sheriff.*

To-wit:

Lot No. ten (10) in the town of Indianapolis.....	$500 00
The west half of the north-east quarter of section ten, township five, north of range three east, in ——— county, eighty (80) acres, more or less.....	400 00
One bay horse.....	80 00
One black cow.....	15 00
	$995 00

We, the undersigned, selected to appraise the property mentioned in the schedule to which this is annexed, upon oath say that the several items, to the best of our judgment, are worth the respective sums specified therein, and that the same is the fair cash value at this time, [exclusive of liens and incumbrances, if any.] N. M., O. P., } *Appraisers.*

Subscribed and sworn to before me, this —— day of ———, 18—. Q. R., *Sheriff of —— county.*

Notices in Court of Conciliation.†

NO. 54.

To C. D.:

You are notified that I have a claim (or cause of action) against you for slanderous words spoken of me by you, (or any of the other causes mentioned in section 3,) and you are required to appear before the court of conciliation in relation thereto, on (naming the day and hour,) at (naming the place,) for the purpose of compromising the same.

Dated. A. B.

* See ante, R. S. vol. 2, p. 137. † See ante, R. S. vol. 2, p. 224.

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NO. 55.*

To A. B.:

You are hereby notified that C. D. has filed with me a claim against you for slanderous words spoken of him by you, and that I will hold a court of conciliation in relation thereto on (naming the day and hour,) at (naming the place,) for the purpose of compromising the same.

Dated ———.

E. F., *Judge of the Court of Conciliation.*

FORMS IN CRIMINAL ACTIONS.

NO. 56.

Oath of the Grand Jury.

You and each of you swear that you will diligently inquire, and true presentment make, of all felonies committed or triable within this county, of which you shall have or can obtain legal evidence; that you will present no person through malice, hatred or ill-will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but in all your indictments you will present the truth, the whole truth, and nothing but the truth; that you will not disclose any evidence given, or proceeding had before the grand jury. So help you God.

NO. 57.

Indictments—Murder.

In the ——— Circuit Court:

The grand jury of the county of ——— charge that A. B., on ———, at ———, purposely and with premeditated malice unlawfully killed and murdered C. D., by shooting him with a pistol, (or by administering to him poison, or by stabbing him with a knife, or by means unknown to the grand jury, as the case may be.)

A. G., Prosecuting Attorney.

NO. 58.

Rape.

The grand jury of the county of ——— charge that A. B., on ———, at ———, unlawfully had carnal knowledge of E. F., a woman, against her will, (or of E. F. a woman child under twelve years of age.)

*See ante, R. S. Vol. 2, p. 224.

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NO. 59.

Arson.

The grand jury for the county of, ——— charge that A. B., on ————, at ————, wilfully and maliciously set fire to the dwelling house of I. N., and thereby occasioned damage to him in the sum of ——— dollars.

NO. 60.

Robbery.

The grand jury of the county of ——— charge that A. B., on ————, at ————, forcibly and feloniously took a gold watch, (or as the case may be,) the property of C. D., from his person, and against his will, by violence to his person, (or by putting him in fear.)

NO. 61.

Larceny.

The grand jury of the county of ——— charge that A. B., on ————, at ————, did feloniously steal, take and carry away one rifle gun, (or as the case may be,) the personal property of C. D., of the value of ——— dollars.

NO. 62.

Counterfeiting.

The grand jury of the county of ——— charge that A. B., on ————, at ————, counterfeited a silver, [or gold,] coin, of the Republic of Mexico, called a dollar, which was at that time current in this State.

NO. 63.

Having Counterfeit Money.

The grand jury of the county of ———, charge that A. B., on ————, at ————, had in his possession a counterfeit five dollar bank note, purporting to be a five dollar bank note issued by the Indianapolis Branch of the State Bank of Indiana, with intent to have the same put in circulation, knowing the same to be counterfeit.

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NO. 64.

Altering Marks.

The grand jury of the county of ———, charge that A. B,, on ———, at ———, altered the mark of a hog, the property of C. D., of the value of ——— dollars, with intent to steal the same.

NO. 65.

Seduction.

The grand jury of the county of ———, charge that A. B., on ———, at ———, had illicit intercourse with C. D., a female of good repute for chastity, under the age of twenty-one years, under a promise of marriage made to her.

NO. 66.

Form of an Information.

In ——— Court of Common Pleas.

P. M., prosecuting attorney for the ——— judicial circuit of the State of Indiana, informs the court that A. B., on ———, at ———, in a rude and angry manner, unlawfully struck and wounded C. D.

P. M., *Prosecuting Attorney.*

NO. 67.

Warrant.

The State of Indiana: To the sheriff of ——— county:

You are commanded to arrest C. D. forthwith, and hold him to bail in the sum of ——— dollars, to answer on the first day of the next term of ——— circuit court, [or court of common pleas,] an indictment [or information] for larceny [or as the case may be,] and for want of bail, commit him to the jail of the county until legally discharged.

Witness, the seal and clerk of the court, this ——— day of ———, 18—. E. F., *Clerk.*

NO. 68.

Recognizance.

State of Indiana, ——— county.

We, C. D. and E. F., owe the State of Indiana ——— dollars to be levied of our property.

The condition of the above is that the said C. D. shall personally be before the ——— court on the first day of the

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next term thereof, to answer a charge of (larceny or other offense) abide the order of the court, and not depart thence without leave; then this recognizance shall be void; else to remain in full force. C. D.

Taken and approved, &c. E. F.

NO. 69.

HABEAS CORPUS.*

The State of Indiana: To ——— ———:

You are commanded to have the body of A. B., in your custody, (or by you restrained of his liberty as it is said) before C. D., judge of the [describe the court] at [name the place] forthwith after the receipt of this writ, [or naming the earliest convenient time] to do and receive what shall be ordered concerning him, and have then and there this writ.

Witness the clerk and seal of the ——— court this —— day of ———. E. F., *Clerk*.

*See ante, R. S. Vol. 2, p. 194.

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PART THIRD.

CONCERNING THE MODE OF PROCEEDING IN CRIMINAL CASES—DEFINING FELONIES AND MISDEMEANORS, AND PRESCRIBING THE PUNISHMENT THEREFOR.

CHAPTER 1.

AN ACT to revise, simplify and abridge the Rules, Practice, Pleadings and Forms in criminal actions in the courts of this State.

[APPROVED JUNE 17, 1852.]

ARTICLE 1.

Local Jurisdiction of Public Offenses.

When liable.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That any person committing an offense against the laws of this State, is liable to be punished therefor in the county having jurisdiction.

In case offense be committed by agent, &c., in the State.

SEC. 2. Every person being without this State, committing or consummating an offense by an agent or means within the State, is liable to be punished by the laws thereof, in the same manner as if he were present, and had commenced and consummated the offense within the State.

In case of a duel.

SEC. 3. Any person leaving this State to fight a duel, or to be concerned as a second therein, or in any other capacity out of the State, is liable to be punished in the county of his residence in the State, in the same manner as if the duel had been contemplated and fought, and the results thereof had terminated, therein.

When partly in one county and partly in another.

SEC. 4. When a public offense has been committed partly in one county and partly in another, or the act or effects constituting or requisite to the consummation of the offense,

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occur in two or more counties, the jurisdiction is in either county.

On board a vessel.

SEC. 5. When an offense is committed in this State, or on the boundary thereof, on board a boat or vessel navigating a river, lake or canal, or lying therein, the jurisdiction is in any county within or opposite to which the offense was committed.*

Jurisdiction in certain offenses.

SEC. 6. The jurisdiction of the following cases is in any county in which the offense was committed, or into or out of which the person upon whom the offense was committed has been brought.

First. For forcibly or fraudulently taking, inveigling or kidnapping any negro or mulatto, to be sent out of the State to be sold as a slave or held to service.

Second. For taking or enticing away any female for the purpose of prostitution.

Third. For taking, decoying or enticing away a child under the age of fifteen years, with intent to detain and conceal it from its parents, guardian or other person having lawful charge of the child.

When property taken in one co. is brought into another.

SEC. 7. When property taken in one county by burglary, robbery, larceny or embezzlement, has been brought into another county, the jurisdiction is in either county.

Accessory.

SEC. 8. An accessory before or after the fact, may be punished in the county where he committed the offense, or in the county where the principal offense was committed.

In case of a mortal wound, &c.

SEC. 9. If any mortal wound is given, or poison administered in one county, and death by means thereof, ensue in another, the jurisdiction is in either county.

ARTICLE II.

Limitation in Criminal Actions.

No limitation.

SEC. 10. Prosecutions for treason, murder, arson, and man-stealing, may be commenced at any time after the commission of the offense.

Sixty days.

SEC. 11. Prosecutions for an offense must be commenced within sixty days after its commission, where the penalty cannot exceed a fine of three dollars.†

*See R. S. vol. 1, p. 197.

†When the time for the prosecution of an offense is limited by statute, the time as averred in the indictment should appear to be within the limit.—*The State* vs. *Rust*, 8 Blackf. 195.

A judgment against a defendant, in a criminal case, will not be reversed because the record does not show that the indictment was indorsed "a true bill," by the foreman of the grand jury.—*Townsend* vs. *The State*, 2 Blackf. 151.

The objection must be made in the circuit court.—*Ibid.*

The record in the case of an indictment, need not show that the indictment was signed by the prosecuting attorney, nor that there was a foreman of a grand jury.—*M cGregg* vs. *The State*, 4 Blackf. 101.

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Two years.

SEC. 12. In all other cases prosecution for an offense must be commenced within two years after its commission.

Statute not to run in certain cases.

SEC. 13. If any person who has committed an offense, is absent from the State, or so conceals himself that process cannot be served upon him, or conceals the fact of the crime, the time of absence or concealment is not to be included in computing the period of limitation.

ARTICLE III.

Grand Jury.

Foreman of grand jury.

SEC. 14. The court appoints the foreman of the grand jury, and may remove him for cause. The foreman is authorized to administer all necessary oaths to witnesses.

Grand jury may be re-summoned.

SEC. 15. Whenever the grand jury, is dismissed before the final adjournment, they may be summoned to attend again at the same term, if necessary; if a full jury do not attend, the number may be completed from the bystanders.

Oath—number to find—indorsement—return, &c.

SEC. 16. Each juror must take the usual oath. The court must plainly instruct them as to their duty. An indictment may be found by any nine. It must be indorsed by the foreman, "A true bill.—A. B. foreman," returned into open court, and filed by the clerk.

Foreman and pros. atty. may afterwards sign bill.

SEC. 17. Each indictment must be signed by the prosecuting attorney, and when the grand jury return any indictment into court, the judge must examine it; and if the foreman has neglected to indorse it "A true Bill," with his name signed thereto, or if the prosecuting attorney has neglected to sign his name, the court must cause the foreman to indorse, or the prosecuting attorney to sign it, as the case may require, in the presence of the jury.

Witnesses.

SEC. 18. When an indictment is presented by the grand jury, the names of all the material witnesses must be indorsed upon the indictment. But other witnesses may afterwards be subpœnæd by the State, but unless the names of such witnesses be indorsed on the indictment, no continuance shall be granted to the State on account of the absence of any witness whose name is not thus indorsed.

ARTICLE IV.

Informations.

Informations, by whom filed

SEC. 19. Informations are filed by the prosecuting attorney upon affidavit in any court having jurisdiction of the offense. Criminal actions prosecuted by information include all offenses not within the jurisdiction of the grand jury, or the exclusive jurisdiction of justices of the peace.

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Affidavit. SEC. 20. When any person has knowledge of the commission of any offense, which may be prosecuted by information, he may make his affidavit before any officer authorized to administer oaths, setting forth the offense and the person charged, in plain and concise language, and file the same with the clerk, or deposit it with the prosecuting attorney.

Affidavit to be filed. SEC. 21. When a peace officer recognizes or commits any one for an offense which may be prosecuted by information, he must file the affidavit containing the charge, in the clerk's office, for the action of the prosecuting attorney.

SEC. 22. When an affidavit is filed with the clerk or prosecuting attorney for an information, the names of the witnesses must also be furnished.

SEC. 23. The prosecuting attorney must file an information as soon as practicable, in term or vacation, in every case, after the charge is made by affidavit.

SEC. 24. The affidavit must be filed with the information.

Amendments. SEC. 25. An information may be amended in matter of substance, or form, at any time before the defendant pleads, without leave; and at any time after the defendant pleads, with leave of the court. The information may be amended, on the trial, as to all matters of form and variance, at the discretion of the court, when the same can be done without prejudice to the rights of the defendant.

SEC. 26. No amendments shall cause any delay of the trial, unless for good cause shown by affidavit.

ARTICLE V.

Arrest and Recognizance.

Warrant, when issued. SEC. 27. When an indictment is found, the court may direct the clerk to issue a warrant returnable forthwith; if no order is made, the clerk must issue a warrant upon all indictments within twenty days after the close of the term. Warrants must be issued upon informations as soon as practicable after being filed; the clerk at the same time must issue a summons for the witnesses.

To whom issued. SEC. 28. The warrant issues to the sheriff of the county where the indictment or information is filed, unless the prosecuting attorney directs the warrant to be issued to some other county. Warrants may issue to different counties at the same time; the sheriff must execute the warrant and serve the summons immediately upon being delivered to him.

What offenses bailable. SEC. 29. All offenses are bailable by sufficient sureties, except murder and treason, when the proof is evident or the presumption strong.

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Court to fix amount of bail.

SEC. 30. The court, at each term, must order the amount in which persons charged by indictment or information, are to be held to bail, and the clerk must indorse the amount on the warrant; the order may apply to informations to be filed in vacation. If no order fixing the amount of bail has been made, the sheriff may present the warrant to the judge of the circuit court or court of common pleas, and such judge must thereupon indorse the amount of bail to be required; or if there is no such judge in the county, the clerk may fix the amount of bail.

Writs of attachment.

SEC. 31. When writs of attachment are returnable after the close of the term, the court must direct the amount of bail to be required of the defendant.

Arrest.

SEC. 32. Arrest is the taking a person into custody that he may be held to answer for a public offense.

How made.

SEC. 33. An arrest is made by an actual restraint of the person of the defendant, or by his submission to the custody of officers.

SEC. 34. The officer must inform the defendant that he acts under authority of a warrant, and must also show the warrant, if required.

SEC. 35. If, after notice of the intention to arrest the defendant, he either flee or forcibly resist, the officer may use all necessary means to effect the arrest.

When made.

SEC. 36. An arrest may be made on any day, or at any time of the day or night; if a person arrested escape or be rescued, the person from whose custody he made his escape, or was rescued, may immediately pursue and retake him, at any time and within any place in the State. To retake the person escaping or rescued, the person pursuing has the same power to command assistance as is given in cases of arrest.

Recognizances.

SEC. 37. Recognizances in criminal proceedings may be taken in open court, and entered on the order book.

Who may take.

SEC. 38. Any officer authorized to execute a warrant in a criminal action, may take the recognizance and approve the bail; he may administer an oath, and examine the bail as to its sufficiency.

To whom certified.

SEC. 39. Every recognizance taken by any peace officer, must be certified by him forthwith to the clerk of the court to which the defendant is recognized. The clerk must thereupon record the recognizance in the order book, and from the time of filing, it has the same effect as if taken in open court.

May deposit money.

SEC. 40. The defendant may, in the place of giving bail, deposit with the clerk of the court to which the defendant is held to answer, the sum of money mentioned in the order, and upon delivering to the sheriff the certificate of deposit, he must be discharged from custody.

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When the sheriff may take.

SEC. 41. When any person is committed for want of bail, and the amount of bail is specified in the warrant of commitment, the sheriff may take the recognizance and approve the bail.

In case of murder.

SEC. 42. When any person is indicted for murder, the court in which the indictment is found, upon motion, or in vacation the judge of the circuit court or court of common pleas, upon application by writ of *habeas corpus*, may admit the defendant to bail when it appears upon examination that he is entitled to be let to bail.

Surrender.

SEC. 43. When a bail desires to surrender his principal, he may procure a copy of the recognizance from the clerk, by virtue of which the bail, or any person authorized by him, may take the principal in any county within the State.

Same.

SEC. 44. The bail, at any time before final judgment against him upon a forfeited recognizance, may surrender his principal in open court, or to the sheriff, and upon the payment of all costs, may thereupon be discharged from any further liability upon the recognizance.

Copy to be delivered.

SEC. 45. The bail must deliver a certified copy of the recognizance to the sheriff, with the principal; and the sheriff must accept the surrender of the principal, and acknowledge it in writing.*

SEC. 46. Any defendant so surrendered, may give other bail, or remain in custody until discharged by due course of law.

Forfeiture.

SEC. 47. If, without sufficient excuse, the defendant neglect to appear for trial or judgment, or upon any other occasion when his presence in court may be lawfully required, according to the condition of his recognizance, the court must direct the fact to be entered upon its minutes, and the recognizance of bail, or money deposited as bail, as the case may be, is thereupon forfeited.

Action against bail.

SEC. 48. The prosecuting attorney may, at any time after the adjournment of the court, proceed by action against the bail upon the recognizance. Such action shall be governed by the rules of civil pleading so far as applicable.†

Defects.

SEC. 49. No action upon a recognizance may be defeated for any defect of form, or any omission of recital, condition or undertaking therein, or neglect of the clerk to endorse or record it; but the recognizors are bound thereby to the full

* The sureties on a recognizance to answer a criminal charge, may at any time before judgment on *scire facias*, surrender their principal, and be released from liability on their recognizance, and such release does not discharge the principal. —*Lorance* vs. *The State*, 1 Carter's Ind. Rep. 359. See *Miller* vs. *The State*, 8 Blackf. 77.

† Though a person recognized to answer an indictment, &c., appear at the trial, &c., yet, if he do not comply with the judgment of the court against him, the recognizance will be forfeited.—*The State* vs. *Whitson*, 8 Blackf. 178.

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extent specified therein. A recognizance may be recorded after execution awarded.

Recognizance, when collectable.

SEC. 50. Any recognizance forfeited by the principal is collectable upon execution, although he is afterwards arrested on the original charge, unless remitted by the court for cause shown.*

ARTICLE VI.

Pleading.

SEC. 51. All criminal prosecutions must be in the name of "The State of Indiana."

SEC. 52. The forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those hereinafter prescribed.

SEC. 53. The first pleading on the part of the State is either an indictment or information.

Contents of indictment, &c.

SEC. 54. The indictment or information must contain:

First. The title of the action, specifying the name of the court to which the indictment or information is presented, and the names of the parties.

Second. A statement of the facts constituting the offense, in plain and concise language, without repetition.

To be direct.

SEC. 55. The indictment or information must be direct and certain, as it regards the party, and the offense charged.†

Time.

SEC. 56. The precise time of the commission of an offense need not be stated in the indictment or information; but it is sufficient if shown to have been within the statute of limitations, except where the time is an indispensable ingredient in the offense.‡

* A recognizance cannot be impeached collaterally for the want of incapacity occasioned by drunkenness of the person by whom it is acknowledged.—*Doe* vs. *Harter*, 1 Carter's Ind. Rep. 427.

The condition of a recognizance, that a person shall appear at the then next term of the circuit court, and from day to day, &c., is a condition for his appearance on the first day of the term, and on every day thereof, unless sooner discharged.—*Wilson* vs. *The State*, 6 Blackf. 212.

The circuit judge may take a recognizance at his chambers, during the term of the circuit court, conditioned for the appearance at a subsequent day of that term, of a party accused of a crime.—*Crandal et al.* vs. *The State*, 6 Blackf. 284.

A recognizance for the principal's appearance, &c., filed on the first day of the proper term, but not then entered of record, was forfeited, &c. Held, that the recognizance might be entered of record at a subsequent term, *nunc pro tunc*.—*Wellman et al.* vs. *The State*, 5 Blackf. 343.

† The caption is no part of an indictment. It is the statement of the clerk in the record, prefatory to the indictment.—*State* vs. *Paine*, 1 Carter's Ind. Rep. 163.

‡ Indictment as follows: "State of Indiana, Hendricks circuit court, October term, 1846. The grand jurors of the State of Indiana, empanneled, &c., upon their oath present that John Paine, late of said county, on the third day of October, in the year aforesaid," &c. Held, that the words "Hendricks circuit court, October term, 1846," were a part of the indictment, and that the statement below, "on the third day of October, in the year aforesaid," referred to those words, and charged the time of the commission of the offense with sufficient certainty.—*State* vs. *Paine*, 1 Carter's Ind. Rep. 163.

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Offense in relation to property.

SEC. 57. In an indictment for an offense committed in relation to property, it is sufficient to state the name of any one or names of several or joint owners.

Words, how construed.

SEC. 58. The words used in an indictment must be construed in their usual acceptation, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.

SEC. 59. Words used in the statute to define a public offense, need not be strictly pursued, but other words, conveying the same meaning, may be used.

When the indictment, &c., is sufficient.

SEC. 60. The indictment or information is sufficient if it can be understood therefrom:

First. That the indictment was found by the grand jury of the county, or the information presented by the prosecuting attorney of the circuit in which the court is held.

Second. That the defendant is named, or described, in an indictment, as a person whose name is unknown to the grand jurors, or in an information, to the prosecuting attorney;

Third. That the offense was committed within the jurisdiction of the court, or is triable therein;

Fourth. That the offense charged is clearly set forth, in plain and concise language, without repetition; and,

Fifth. That the offense charged is stated with such a degree of certainty, that the court may pronounce judgment upon a conviction, according to the right of the case.

Not to be quashed for certain defects.

SEC. 61. No indictment or information may be quashed or set aside for any of the following defects:

First. For a mistake in the name of the court or county in the title thereof;

Second. For the want of an allegation of the time or place of any material fact, when the venue and time have once been stated in the indictment, or information;

Third. That dates and numbers are represented by figures;

Fourth. For an omission of any of the following allegations, viz: "With force and arms," "contrary to the form of the statute," or, "against the peace and dignity of the State of Indiana;"

Fifth. For an omission to allege that the grand jurors were empanneled, sworn or charged;

Sixth. For any surplusage or repugnant allegation, when there is sufficient matter alleged to indicate the crime and person charged; nor,

Seventh. For any other defect or imperfection which does

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not tend to the prejudice of the substantial rights of the defendant upon the merits.*

SEC. 62. Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in an indictment or information.

Pleading a judgment.

SEC. 63. In pleading a judgment or other determination of a court or officer of special jurisdiction, it is sufficient to allege, generally, that the judgment or determination was duly made or had before such court or officer; but the facts constituting the jurisdiction, must be established on the trial.

Pleading a statute.

SEC. 64. In pleading a private statute, or a right derived therefrom, it is sufficient to refer to the statute by its title and the day of its approval, and the court must take notice thereof.

Several defts.

SEC. 65. Upon an indictment against several defendants, any one or more may be convicted or acquitted.

Accessories.

SEC. 66. Any person who counsels, aids, or abets in the commission of any offense, may be charged, tried and convicted in the same manner as if he were a principal. †

Accessory after the fact.

SEC. 67. An accessory after the fact to the commission of a felony may be indicted, tried and punished, though the principal be neither indicted or tried.

Indictment to be recorded.

SEC. 68. Every indictment must be recorded by the clerk during the term at which the same is found, in a book to be kept for that purpose. The judge must compare the record

* If it appear that several counts in an indictment charge distinct felonies, and not one and the same felony in different modes, the indictment should be quashed. —*The State* vs. *Smith*, 8 Blackf. 489. *Quære*, whether the joinder of counts for distinct felonies in an indictment is a good cause for quashing part of an indictment.—*Ibid.*

A count in an indictment charging three offenses, is bad for duplicity. — *The State* vs. *Shields*, 8 Blackf. 151.

An indictment cannot be objected to because one of the grand jurors who found it was an alien.—*The State* vs. *Taylor*, 8 Blackf. 178.

The joinder of counts for separate felonies in an indictment, is a good cause for quashing the indictment on motion made before pleading to issue. But the refusal of the court in such case, after plea, to compel the prosecuting attorney to elect on which count he will proceed, is not error. — *Weinzorpflin* vs. *The State*, 7 Blackf. 186.

A person indicted for an offense created by statute, cannot be convicted after a repeal of the statute, unless the repealing statute contain a saving clause.—*Taylor* vs. *The State*, 7 Blackf. 93.

In the caption of an indictment a certain year was named; but in the indictment itself, commencing with the words "the grand jurors empanneled," &c., there was no notice of any year, except by the words "in the year of our Lord aforesaid," &c. Held, that the indictment therefore (the caption being no part of it,) was bad.—*The State* vs. *Hopkins et al.*, 7 Blackf. 494.

See *Beauchamp* vs. *The State*, 6 Blackf. 299; *The State* vs. *McDowell*, 6 Blackf. 49; *Finch* vs. *The State*, 6 Blackf. 503.

If an indictment for a felony contain several counts, and it be proved to be the design of the prosecuting attorney to convict the defendant of separate felonies, the court will compel him to elect on which count he will rely. But the mere circumstance of there being several counts, is not, of itself, sufficient to require such an election to be made.—*McGregg* vs. *The State*, 4 Blackf. 101.

† See post, R. S. vol. 2, title "Felonies, Accessories."

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with the original indictments, and certify the correctness thereof. In case the original indictment is lost or destroyed, the defendant may be tried upon a copy taken from the record and certified by the clerk, without any delay from that cause.

Loss of information.

SEC. 69. In case of the loss or destruction of an information, the prosecuting attorney may file in court another information, and the prosecution shall proceed, and trial be had without any delay from that cause.

Who to have access to indictments.

SEC. 70. Indictments and informations against persons not in custody, or who have not given bail, and the records of such indictments are in the custody of the clerk, and cannot be inspected by any person except the court, the clerk, and his deputy, and prosecuting attorney, until after the arrest of the defendant.

Disclosure of a finding.

SEC. 71. No grand juror, prosecuting attorney, clerk, judge, or other officer, can disclose the fact that an indictment is found, or information filed, until the defendant has been arrested, except any disclosure that may be necessarily incident to the issue and service of a warrant to arrest, the defendant. A violation of this and the next preceding section, is punishable as a contempt.

Offenses of different degrees.

SEC. 72. Upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment, and guilty of any degree inferior thereto, or of an attempt to commit the offense.*

SEC. 73. In all other cases the defendant may be found guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment.

Counts for murder.

SEC. 74. Counts for murder in the first and second degree, and for manslaughter, may be joined in the same indictment, and on the trial the defendant may be convicted of either offense.

ARTICLE VII.

Place of Trial, and Change of Venue.

Place of trial.

SEC. 75. Every criminal action must be tried in the county where instituted, except when otherwise provided in this act.

Change of venue.

SEC. 76. The defendant may show to the court by affidavit that he believes he cannot receive a fair trial, owing to the prejudice of the judge, or to excitement or prejudice against the defendant in the county, or some part thereof, and demand to be tried by disinterested triers.

From the common pleas to the cir. court.

SEC. 77. When the objection is to the judge in an action pending in the court of common pleas, the action may be

* See ante, sec. 61, Criminal Code and notes.

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transferred to the circuit court of the county, and tried therein. When the objection is to the judge of the circuit court, any other circuit judge or judge of the supreme court may hold the court and try the cause.

To an adjoining county.

SEC. 78. When the affidavit is founded upon excitement or prejudice in the county against the defendant, the court may in its discretion grant a change of venue to the most convenient county. The clerk must thereupon make a transcript of the proceedings and order of court, and having sealed up the same with the original papers, deliver them to the sheriff, who must without delay deposit them in the clerk's office of the proper county, and make his return accordingly.*

SEC. 79. The jurisdiction of the latter court is complete, and the cause must be docketed and stand for trial at the first term.

ARTICLE VIII.

Empanneling the Jury.

One who asks to be a juryman.

SEC. 80. When a jury trial is demanded, the sheriff shall call a jury in the manner prescribed by law, or as directed by the court. Any person who may solicit or attempt to influence the sheriff to put him or another person on the jury, shall be punished by imprisonment as for a contempt. If any person is placed on the jury by such request, it shall be good cause for challenge, or new trial.

Challenges by defendant.

SEC. 81. In prosecutions for capital offenses, the defendant may challenge peremptorily twenty jurors; in prosecutions for offenses punishable by imprisonment in the State prison, ten jurors; in other prosecutions, three jurors. When several defendants are tried together, they must join in their challenges. †

* The refusal to change the venue in a criminal case, cannot be assigned for error.—*Spence* vs. *The State*, 8 Blackf. 281.

Same point decided in *Findley* vs. *The State*, 5 Blackf. 576; also, *Sumner* vs. *The State*, *Ib.* 579.

In a criminal case, taken by a change of venue from one circuit court to another, the record on a writ of error must show, not only that the court before which the indictment was found, but also that the court which tried the cause, had jurisdiction of the offense.—*Doty* vs. *The State*, 7 Blackf. 427.

The jurisdiction of the court that tried the cause, can be shown only by a statement, in the nature of a caption to its proceedings, that the indictment was filed there, and that the prisoner was tried there.—*Ibid.*

The indictment should also constitute a part of the record of the last-mentioned court.—*Ibid.*

† The defendant's right in the case of an indictment, to challenge a juror peremptorily remains open until the juror is sworn.—*Munly* vs. *The State*, 7 Blackf. 593.

Same point decided in case of *Morris* vs. *The State*, 7 Blackf. 607. See *Beauchamp* vs. *The State*, 6 Blackf. 299.

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Challenges by the State.

SEC. 82. The prosecuting attorney, in capital cases, may challenge peremptorily six jurors; in other cases three jurors.

SEC. 83. No alien may be called as a juror.

Jurors may be examined.

SEC. 84. When the jurors are called, each may be examined on oath by either party, whether he has formed or expressed an opinion of the guilt or innocence of the defendant, and upon such examination and other questions put by leave, the court may determine upon the competency of the juror. Any juror is incompetent who has formed or expressed an opinion of the guilt or innocence of the defendant.

Conscientious opinions.

SEC. 85. If the offense charged be punishable with death, any person entertaining such conscientious opinions as would preclude his finding the defendant guilty, shall not serve as a juror.

Trial by the court.

SEC. 86. The defendant and prosecuting attorney, with the assent of the court, may submit the trial to the court except in capital cases; all other trials must be by jury.

ARTICLE IX.

Witnesses.

Witnesses.

SEC. 87. Witnesses may be compelled to attend and testify before the grand jury; and witnesses on behalf of the State, or of the defendant in a criminal prosecution may be compelled to attend and testify in open court, if they have been subpœnaed, without their fees being first paid or tendered, unless otherwise provided by law. The court may recognize witnesses with or without surety to attend and testify at the same or next term.

Subpœna for witnesses.

SEC. 88. The clerk shall, at the time of issuing a warrant for the defendant, issue a subpœna for all the witnesses whose names are indorsed on the indictment, and any others required.

Gaming.

SEC. 89. Any person called as a witness to testify against another for gaming, is a competent witness to prove the offense, although he may have been concerned as a party, and is compelled to testify as other witnesses; but he shall not be liable to indictment or punishment in any such case.

Who competent

SEC. 90. The following persons are competent witnesses:

First. All persons who are competent to testify in civil actions;*

Second. The party injured by the offense committed;

Third. Accomplices, when they consent to testify.

Genuineness of a note, &c.

SEC. 91. Persons of skill may be called to prove the genuineness of a note, bill, draft or certificate of deposit, but three witnesses at least shall be required to prove the

* See ante, R. S. vol. 2, p. 80, 81, 82 and 83.

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fact, except in the case of a larceny thereof. The single evidence of the cashier of the bank purporting to have issued the same may be received as sufficient.

Depositions.

SEC. 92. The defendant may, by leave of court, take the depositions of witnesses residing out of the State, to be read on the trial; but before leave is given the defendant must enter of record his consent that the depositions of witnesses residing out of the State may be taken and read on behalf of the State, relative to the same matter; and the defendant may, on the same terms, by leave of court, or by notice to the prosecuting attorney, take the deposition of any witness conditionally.

Confessions.

SEC. 93. The confession of a defendant made under inducement with all the circumstances may be given in evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction, without corroborating testimony.*

ARTICLE X.

Trial.

Deft. to be present.

SEC. 94. No person prosecuted for any offense punishable by death, or by confinement in the State prison, or in the county jail, shall be tried, unless personally present during the trial.

* Where the defendant in open court confesses that he is guilty of the offense with which he is charged in the indictment, a trial is unnecessary, and the court have nothing to do, but to award judgment. The court, however, are usually very backward in receiving and recording such a confession, and will generally advise the prisoner to retract it, and plead to the indictment.—2 Hale, 225.

Confessions must be made voluntarily.—*Ibid.*

To say that it will be better for him if he confesses, or worse, if he does not, may be sufficient to exclude all subsequent declarations by the prisoner, if such remarks were made under circumstances which induce a belief that they had an influence on his mind. And where a confession has once been induced by such means, all admissions afterwards of the same, or of the like facts, must be rejected, for they have resulted from the same influence. Admissions made by one after the transaction, cannot be received against the others.—Swan's Treat. 73.

In all cases the whole of the confession should be given in evidence; for it is a general rule, that the whole account a party gives of a transaction, must be taken together; and his admission of a fact disadvantageous to himself, shall not be received, without receiving, at the same time, his contemporaneous assertion of a fact favorable to him, not merely as evidence that he made such assertion, but admissible evidence of the matter thus alleged by him in his discharge.—4 Taunt. 245.

If evidence of the statement of a prisoner accused of a crime tending to show his guilt, be objected to on the ground that the statement was made under the expectation of a benefit, &c., but it appear to the court from the statement, &c., that it was not made under such expectation, the objection must fail.— *Findley* vs. *The State*, 5 Blackf. 576.

On the trial of an indictment under the act against fraudulent voting, the defendant's statements, made under oath at the polls on being challenged, are not admissible evidence for him; nor is the decision of the judges of the election in favor of his right to vote, any defense.—*Morris* vs. *The State*, 7 Blackf. 607.

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Stipulation. SEC. 95. No person prosecuted for any offense punishable by a fine only, shall be tried without being personally present, unless some responsible person, approved by the court, undertakes to be bail for stay of execution, and payment of the fine and costs that may be assessed against the defendant. Such undertaking must be in writing, and is as effective as if entered after judgment.

Arraignment. SEC. 96. The defendant is arraigned by reading to him the indictment, and requiring him to plead thereto. The court may, for cause shown, grant a reasonable time to answer the indictment.

General issue. SEC. 97. In all criminal prosecutions, the defendant may plead the general issue orally, which shall be entered on the minutes of the court, and under it every matter of defense may be proved.

"Not guilty." SEC. 98. If a defendant refuse to plead to an indictment, or information, a plea of not guilty must be entered by the court, and the trial proceed.

Wrong name. SEC. 99. If a defendant be indicted by a wrong name, unless he declare his true name before pleading, he shall be proceeded against by the name in the indictment.

Same. SEC. 100. If he allege that another name is his true name, it must be entered in the minutes of the court; and the subsequent proceedings on the indictment may be had against him, by that name, referring also to the name by which he is indicted.

When may be quashed. SEC. 101. The court may quash an indictment, on motion, when it appears upon its face, either—

First. That the grand jury had no legal authority to inquire into the offense charged;

Second. That the facts stated do not constitute a public offense;

Third. That the indictment contains any matter which, if true, would constitute a legal justification of the offense charged, or other legal bar to the prosecution.

SEC. 102. No indictment shall be non-prossed, except by order of the court, on motion.

Order of trial. SEC. 103. The jury being empanneled and sworn, the trial may proceed in the following order:

First. The prosecuting attorney must state the case, and offer the evidence in support of the prosecution;

Second. The defendant, or his counsel, may then state his defense, and offer evidence in support thereof;

Third. The parties may then respectively offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

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Fourth. When the evidence is concluded, unless the case is submitted without argument, the prosecuting attorney must commence, and the defendant, or his attorney, may conclude the argument to the jury;

Fifth. The court must then charge the jury.

Reasonable doubt.

SEC. 104. A defendant is presumed to be innocent, until the contrary is proved. When there is a reasonable doubt whether his guilt is satisfactorily shown, he must be acquitted. When there is a reasonable doubt in which of two or more degrees of an offense he is guilty, he may be convicted of the lowest degree only.*

SEC. 105. When two or more defendants are indicted jointly, any defendant requiring it, must be tried separately.

Discharge of a defendant to testify.

SEC. 106. When two or more persons are included in one prosecution, the court may, at any time before the defendant has gone into his defense, direct any defendant to be discharged, that he may be a witness for the State. A defendant may, also, when there is not sufficient evidence to put him on his defense, at any time before the evidence is closed, be discharged by the court for the purpose of giving testi-

* The court, on the trial of a criminal case, instructed the jury as follows: "If the defendant has omitted to avail himself of evidence within his reach, by which he might have repelled that which was offered to his prejudice, his omission to do so implies a strong presumption that the charge is well founded." Held, that the instruction was erroneous.—*Doty* vs. *The State*, 7 Blackf. 427.

If the record of a criminal case show that in the course of the trial the court had, on an adjournment from one day till the next, placed the jury in charge of a bailiff, it will be presumed that the jury was committed to his care in a legal manner, whatever that may be.—*Dias* vs. *The State*, 7 Blackf. 20.

If in a capital case, the jury be satisfied from the evidence, though circumstantial, beyond a reasonable doubt, of the defendant's guilt, they may convict him; and they may be so satisfied, without evidence proving or tending to prove that it was impossible that another should be the guilty person.—*Findley* vs. *The State*, 5 Blackf. 576.

If the circumstances proved in such case do not satisfy the jury, beyond a rational doubt, of the defendant's guilt, he should be acquitted, whether he did or did not disprove any of those circumstances.—*Ibid.*

If the jury, from making up their minds from circumstantial evidence, in a capital case, have a rational doubt as to the existence of any one of the material circumstances attempted to be proved, that circumstance ought not to have any influence with them in forming their opinion respecting the guilt or innocence of the defendant.—*Sumner* vs. *The State*, 5 Blackf. 579.

Although the jury in such case believe, from the evidence, that *it was possible* that some other person than the defendant committed the crime, it does not necessarily follow that there must be a verdict of acquittal.—*Ibid.*

Circumstantial evidence, in such case, to be sufficient for a conviction, should tend to exclude every supposition inconsistent with the defendant's guilt.—*Ibid.*

Although the evidence in such case may not be sufficient to produce, on the minds of the jury, an absolute certainty of the defendant's guilt, nor to prove that he had any motive to commit the crime charged, yet it may be sufficient to satisfy the jury, beyond a reasonable doubt, that he was guilty, and justify a verdict against him.—*Ibid.*

See *Hiter* vs. *The State*, 4 Blackf. 552.

Indictment for larceny. Plea, not guilty. Verdict and judgment for the State. It appeared by the transcript, that the cause had been tried by only eleven jurors. The court held the trial to be a nullity, set aside the judgment and verdict, and remanded the case for another trial.—*Brown* vs. *The State*, 8 Blackf. 561.

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mony for a co-defendant. The order of discharge is a bar to another prosecution for the same offense.

Mistake in charging offense.

SEC. 107. When it appears at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant shall not be discharged, if there appears to be good cause to detain him in custody, but the court must recognize him to answer to the offense; and if necessary, recognize the witnesses to appear and testify.

When in the wrong county.

SEC. 108. When it appears at any time before verdict or judgment, that the defendant is prosecuted in a county not having jurisdiction, the court may order the venue of the indictment to be corrected, and direct that all the papers and proceedings be certified to the proper court of the proper county, and recognize the defendant and witnesses to appear at such court, on the first day of the next term thereof, and the prosecution shall proceed in the latter court in the same manner as if it had been there commenced.

SEC. 109. When a jury has been empanneled in either case contemplated in the two last preceding sections, such jury may be discharged without prejudice to the prosecution.

What to be a bar

SEC. 110. When the defendant has been convicted or acquitted upon an indictment for an offense consisting of different degrees, the conviction or acquittal shall be a bar to another indictment for the offense charged in the former, or for any lower degree of that offense, or for an offense necessarily included therein.

When a juror has knowledge of a material fact.

SEC. 111. If a juror have personal knowledge of any fact material to the cause, he must declare it to the court, and not to his fellow jurors out of court. If a juror declare a fact material to the cause to his fellow jurors, without the knowledge of the court and defendant, he may be punished as for a contempt.

Court to instruct jury upon an adjournment

SEC. 112. When the jurors are permitted to separate, after being empanneled, and at each adjournment, they must be admonished by the court that it is their duty not to converse among themselves, nor suffer others to converse with them on any subject connected with the trial or to form or express any opinion thereon, until the cause is finally submitted to them.

Charge to be in writing, when asked.

SEC. 113. The judge must charge the jury in writing when either party request it, and the charge shall be filed among the papers of the cause. In charging the jury, he must state to them, all matters of law which are necessary for their information in giving their verdict. If he presents the facts of the case, he must inform the jury that they are exclusive judges of all questions of fact.

Jury to retire in charge of an officer.

SEC. 114. After hearing the charge, the jury may either decide in court or retire for deliberation. They may retire

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under the charge of an officer sworn to keep them together in some private and convenient place, without food, except such as the court shall order, and not permit any person to speak or communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed upon their verdict, and return them into court, or when ordered by the court. The officer shall not communicate to any person the state of their deliberations.

Verdict.

SEC. 115. When the jury have agreed upon their verdict, they must be conducted into court by the officer having them in charge. Their names must then be called, and if all appear, their verdict must be rendered in open court. If all do not appear, the rest must be discharged without giving a verdict, and the cause must be tried again at the same or next term.

SEC. 116. When the defendant is found guilty, the jury must state in their verdict the amount of fine, and the punishment to be inflicted.

Judgment.

SEC. 117. When the defendant is found guilty, the court shall render judgment accordingly, and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise.

ARTICLE XI.

Exceptions.

Exceptions.

SEC. 118. On the trial of a criminal prosecution, exceptions may be taken by the defendant to any decision of the court upon a matter of law, by which his substantial rights are prejudiced.

Bill of exceptions. Appeal; effect thereof.

SEC. 119. The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the supreme court. The bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved. In case of the acquittal of the defendant, the prosecuting attorney may take the reserved case to the supreme court upon an appeal at any time within one year. The supreme court is not authorized to reverse the judgment upon such appeal, but only to pronounce an opinion upon the correctness of the decision of the court below. The opinion of the supreme court shall be binding upon the inferior courts, and shall be a uniform rule of decision therein. When the decision of the court below is decided to be erroneous, the appellee must pay the costs of the appeal.

Exceptions, when taken.

SEC. 120. All bills of exception in a criminal prosecution must be made out and presented to the judge at the time of the trial, or within such time thereafter during the term, as the court may allow, signed by the judge and filed by the

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clerk. The exception must be taken at the time of the decision.

SEC. 121. The bill of exceptions must contain so much of the evidence only as is necessary to present the question of law upon which the exceptions were taken.

ARTICLE XII.

Judgment and Execution.

Judgment.

SEC. 122. After verdict of guilty, or finding of the court, against the defendant, if the judgment be not arrested, or a new trial granted, the court must pronounce judgment.

Defendant to be present.

SEC. 123. For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him to replevy the judgment and costs; judgment may then be rendered in his absence.

SEC. 124. When the defendant is convicted of any offense if he be in custody, the court may direct the officer in whose custody he is, to bring him before it for judgment.

Warrant may be issued for defendant.

SEC. 125. If in any case the defendant is not present when his personal attendance is necessary, the court may order the clerk to issue a warrant for his arrest, which may be served in any county of this State as a warrant of arrest in other cases.

Deft. to be asked if he have anything to say.

SEC. 126. When the defendant appears for judgment, he must be informed by the court of the verdict of the jury, and asked whether he have any legal cause to show why judgment should not be pronounced against him.

SEC. 127. If no sufficient cause be alleged or appear to the court why judgment should not be pronounced, it shall thereupon be rendered.

Fine and costs.

SEC. 128. When the defendant is adjudged to pay any fine and costs, the court shall order him to be committed to the jail of the county until the same are paid or replevied.

Execution.

SEC. 129. Upon a judgment for fine and costs, execution shall be issued against the property of the defendant, and returned in the same manner as in civil actions.*

Fifty cents per day to be allowed prisoner, when.

SEC. 130. Any person imprisoned for failure to pay or replevy any fine or costs, may be ordered to be discharged by the court or by the judge of any court, after being imprisoned one day for every fifty cents of the fine and costs, if it appear by satisfactory proof that such person is unable to pay or replevy the same; but execution may issue against the property of the defendant as on other judgments.

* See ante, R. S. vol. 2, p. 128 and post.

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Criminal actions—execution and judgment.

Stay of execution.

SEC. 131. Every defendant in a criminal action against whom a judgment has been rendered, may stay the execution for the fine assessed and costs for ninety days from the rendition of the judgment, by entering replevin bail in like manner as is provided in civil actions; the entry of replevin bail has the same force as in civil actions.

Hanging.

SEC. 132. The punishment of death prescribed by law must be inflicted by hanging by the neck, at such time, not less than fifteen days after conviction, as the court may adjudge.

Respite.

SEC. 133. When execution of such sentence is respited to a farther day by the Governor, the sheriff must note the same on the warrant, and the defendant must be detained in custody until the day to which the respite is granted; at which time the sheriff, unless the judgment is reversed or the defendant pardoned, must execute the sentence between the hours specified in the judgment, and return the warrant with the respite.

Manner of executing death-penalty.

SEC. 134. The sentence of death shall be executed in some private enclosure as near to the jail as possible. The sheriff shall invite to be present at the execution, by at least three days' notice, the prosecuting attorney, clerk of the court, together with two physicians and twelve reputable citizens, to be selected by him. He must also, at the request of the defendant, permit any minister of the Gospel, whom the defendant may name, and any of his relatives, to attend the execution; and also such peace officers as the sheriff may deem proper. No person other than those mentioned in this section can be present at the execution, nor can any person under age be allowed to witness the same.

State prison.

SEC. 135. When any person is convicted and sentenced to imprisonment in the State prison, the clerk must, without delay, certify under the seal of the court, a copy of the judgment to the sheriff.

Sheriff to convey convict.

SEC. 136. The sheriff must, as soon as practicable, convey the convict to the State prison, and deliver him to the keeper thereof, with the copy of the judgment, and take from the keeper a receipt for the convict.

Same.

SEC. 137. The sheriff, in conveying a convict to the State prison, may demand the assistance of any sheriff, jailor or citizen, and the use of any jail in any county through which he may pass, as occasion may require.

Court may require the defendant to keep the peace.

SEC. 138. In case of a conviction for an offense not punishable by death or imprisonment in the State prison, in addition to the punishment required by law, the court may require the defendant to enter into a recognizance, with surety, in a reasonable sum, to keep the peace for any time not exceeding one year, or in default thereof to stand committed.

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SEC. 139. The sheriff must return every process issued to him with his doings indorsed thereon.

ARTICLE XIII.

New trial and arrest of Judgment.

SEC. 140. A new trial is a re-examination of the issue in the same court.

SEC. 141. The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to, either in the evidence or argument.

Causes for a new trial.

SEC. 142. The court may grant a new trial for the following causes, or any of them.*

First. When the jury has received any evidence, paper or document not authorized by the court, or the court has admitted illegal testimony, or for newly discovered evidence.

Second. When the jury have separated without leave of the court after retiring to deliberate upon their verdict, or have been guilty of any misconduct tending to prevent a fair and due consideration of the case.

Third. When the verdict has been decided by means other than a fair expression of opinion on the part of all the jurors.

Fourth. When the court has misdirected the jury in a material matter of law.

Fifth. When the verdict is contrary to law or evidence; but not more than two new trials shall be granted for this cause alone.

SEC. 143. The application for a new trial must be made before judgment.

Arrest of judgment.

SEC. 144. A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea or verdict of guilty, or finding of the court, and may be granted by the court for either of the following causes:

First. That the grand jury who found the indictment had no legal authority to inquire into the offense charged, by reason of it not being within the jurisdiction of the court.

Second. That the facts stated do not constitute a public offense.

SEC. 145. The court may also, on its view of any of these defects, arrest the judgment without motion.

Effect of motion.

SEC. 146. The effect of allowing a motion in arrest of judgment is to place the defendant in the same situation in which he was before the indictment was found, except in cases otherwise provided for.

*See ante, R. S. vol. 2, p. 117.

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Court may order defendant to be recommitted, &c.

SEC. 147. When judgment is arrested in any case, and there is reasonable ground to believe that the defendant can be convicted of an offense if properly charged, the court may order the defendant to be re-committed, or admitted to bail anew, to answer a new indictment.

ARTICLE XIV.

Appeal.

Appeal.

SEC. 148. An appeal to the supreme court may be taken by the defendant, as a matter of right, from any judgment against him, and upon the appeal, any decision of the court or intermediate order made in the progress of the case, may be reviewed.

Writs of error abolished.

SEC. 149. Writs of error in criminal actions are abolished. An appeal from a judgment in a criminal action may be taken in the manner and in the cases prescribed in this chapter [article.]

Cases of appeal.

SEC. 150. Appeals to the supreme court may be taken by the State in the following cases, and no others:

First. Upon a judgment for the defendant, on quashing or setting aside an information or indictment;

Second. Upon an order of the court, arresting the judgment.

Third. Upon a question reserved by the State.

Within a year.

SEC. 151. The appeal must be taken within one year after the judgment is rendered, and the transcript must be filed within thirty days after the appeal is taken.

How taken.

SEC. 152. An appeal is taken by the service of a notice upon the clerk of the court where the judgment was rendered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the prosecuting attorney. If taken by the State, a similar notice must be served upon the defendant, if he can be found in the county; if not, then by posting up a notice three weeks in the clerk's office.

SEC. 153. An appeal taken by the State in no case stays or affects the operation of the judgment in favor of the defendant, until the judgment is reversed.

Effect of appeal.

SEC. 154. An appeal to the supreme court from a judgment of conviction, does not stay the execution, except where the judgment is for a fine, or fine and costs only, in which case the execution may be stayed by an order of the supreme court, or a judge thereof.

What to be certified.

SEC. 155. In case of an appeal from a question reserved on the part of the State, it is not necessary for the clerk of the court below to certify in the transcript any part of the proceedings and record, except the bill of exceptions and the

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judgment of acquittal. When the question reserved is defectively stated, the supreme court may direct any other part of the proceedings and record to be certified to them.

Trial in sup. court.

SEC. 156. An appeal shall stand for trial immediately after filing the transcript, if the supreme court is in session; if not in session, at the next term thereafter, on proof of notice of appeal to the appellee.

Joint defendants.

SEC. 157. When several defendants are tried jointly, any one or more of them may take an appeal; but those who do not join in the appeal shall not be affected thereby.

Cause, when remanded.

SEC. 158. The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case the cause must be remanded to the court below with proper instructions, and the opinion of the court, within the time and in the manner to be prescribed by rule of the court.

Order of sup. court.

SEC. 159. When a judgment against the defendant is reversed, and it appears that no offense whatever has been committed, the supreme court must direct that the defendant be discharged. But if it appear that the defendant is guilty of an offense, although defectively charged in the indictment, the supreme court must direct the superintendent of the State prison to cause the prisoner to be returned and delivered over to the jailor of the proper county, there to abide the order of the court in which he was convicted.

SEC. 160. On an appeal the court must give judgment, without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.

Informalities.

SEC. 161. An appeal shall not be dismissed for any informality or defect in taking an appeal, if the same be corrected within a reasonable time. After an appeal has been dismissed another appeal may be taken.

SEC. 162. On a judgment of affirmance against the defendant, the original judgment must be carried into execution as the appellate court may direct.

SEC. 163. All opinions of the supreme court in criminal prosecutions must be given in writing, and recorded in the order book.

ARTICLE XV.

Miscellaneous Provisions.

Jury may be taken to inspect a place where fact occurred.

SEC. 164. Whenever, in the opinion of the court, it is proper for the jury to have a view of the place in which any material fact occurred, it may order them to be conducted in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court

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for that purpose. While the jury are thus absent, no person, other than the officer, and a person appointed to show them the place, shall speak to them on any subject connected with the trial.

Officer may break open house, when.

SEC. 165. To make an arrest, in criminal actions, the officer may break open any outer or inner door, or window of a dwelling house, or other building, or any other enclosure, if after notice of his office and purpose, he be refused admittance.

SEC. 166. When the sheriff or other officer is guilty of corruption in selecting or empanneling a grand or traverse jury, it is good cause of challenge to any of the jurors so selected or empanneled.

SEC. 167. Every judgment, commitment and process of the circuit, and court of common pleas, must be executed by the sheriff.

Convict to be returned, how.

SEC 168. When any convict in the State prison is ordered to be returned to the county where he was convicted, to await a new trial, the keeper of the State prison must execute the order. The keeper is entitled to such fees therefor as are allowed to the sheriff for taking the convict to the State prison.

Costs.

SEC. 169. When a defendant is acquitted in a criminal action he is not liable for any costs, except when otherwise provided in this act.

Term "person" defined.

SEC. 170. When the term "person," or other word is used to designate the party whose property is the subject of an offense, or against whom any act is done with intent to defraud or injure, the term may be construed to include the United States, this State, or any other State or territory, or any public or private corporations, as well as an individual.

Definitions.

SEC. 171. All definitions of terms in the act prescribing the rules of pleading and practice in civil actions, are adopted in this act, as far as the same are applicable.

Laws repealed and continued.

SEC. 172. All laws inconsistent with the provisions of this act, are hereby repealed. The laws and usages of this State, relative to pleading and practice, in criminal actions, not inconsistent herewith, as far as the same may operate in aid hereof, or to supply any omitted case, are hereby continued in force.

Deposit to be returned, when.

SEC. 173. If money has been deposited instead of bail, and the defendant, at any time before the forfeiture thereof, shall give sufficient special bail, or shall surrender himself, in open court, or to the sheriff, as provided in this act, or be in any

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manner legally discharged, the court shall order a return of the deposit to the defendant.*

* Judgment against a person for having in his possession counterfeit bank notes, with intent to put them in circulation. The indictment was found on the first day of the term, and, on the second day thereof, the defendant being arraigned, moved for a continuance on an affidavit made by him, stating that he could not safely go into trial for the want of the evidence of A. and B., of Massac county, Illinois; that he expected to prove, and could prove by them and each of them, that he was an honest and upright man in all his dealings; that he expected to prove by them how he came into the possession of the counterfeit money named in the indictment; that it was passed to him in an honest transaction, so far as he was concerned; that he never knew or judged said money to be counterfeit, until he was arrested on said charge; that he knew of no witness within the jurisdiction of the court by whom he could prove the same facts; that he could obtain their testimony by the next term, and that the affidavit was not made for delay, &c. The motion was overruled. Held, that the continuance should have been granted.—*Spence* vs. *The State*, 8 Blackf. 281.

CHAPTER 2.

AN ACT authorizing the Circuit Courts of this State to try and determine Indictments for Felony on an enrolled copy thereof duly certified.

[APPROVED JANUARY 30, 1852.]

Record or copy of indictment sufficient.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever any indictment may be stolen, lost or destroyed, and the same shall have been enrolled, or copied into the records of the court in which the same may have been found, or upon the records of the court where such cause may be pending for trial, the record, or a certified copy thereof, when such indictment may have been enrolled or copied, shall be sufficient evidence of the finding of said indictment and the contents thereof, and the trial thereon shall proceed and be determined in the same manner and have the same binding force and effect as if the original indictment were present: *Provided, however*, that in all such cases the defendant's consent in open court shall first be given to go to trial on such copy and waive the production of the original indictment. Then, in that case, the trial shall be had, and all proceedings connected therewith, as if the original indictment was before the court, and the defendant being tried thereon, and having once given such consent, such defendant shall not be permitted to withdraw the same.

Proviso.

Statute of limitations not to run for one year

SEC. 2. Whenever any indictment shall have been lost, mislaid or stolen, at any time before final judgment thereon, the statute of limitations shall not bar the finding of a new

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indictment for the same offense, and the arraignment and trial of the defendant thereon, at any time within one year from the time such indictment shall have been ascertained to be lost, stolen or mislaid.

Emergency.

SEC. 3. It is declared that an emergency exists for the immediate taking effect of this act, inasmuch as there is now a case pending in this State upon which the provisions of this act will operate. Otherwise, the defendant will have to remain in prison an unreasonable length of time; therefore, the same shall take effect and be in force from and after its passage.

CHAPTER 3.

AN ACT to provide for the election, and certain of the duties of Prosecuting and District Attorneys.

[APPROVED JUNE 11, 1852.]

Election—in what courts to prosecute.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, At the general election in the year 1852, and every second year thereafter, there shall be elected in each judicial circuit, a prosecuting attorney, who shall prosecute the pleas of the State, in the circuit courts of such circuit. And also, in each court of common pleas district, a district attorney who shall prosecute the pleas of the State in the common pleas, and justices' courts of such districts.

Bond.

SEC. 2. Every person elected to the office of prosecuting or district attorney, before entering upon the duties of his office, shall execute a bond in the penal sum of five thousand dollars with surety, to be approved in case of a prosecuting attorney, by the judge of the circuit, and in case of the district attorney, by the judge of the district, which bond shall be filed in the clerk's office of the county in which such prosecuting or district attorney may reside, and shall be recorded by the clerk thereof, in an order book of the proper court.

To prosecute felonies and misdemeanors, how.

SEC. 3. Whenever any prosecuting or district attorney shall receive information of the commission of any felony or such district attorney of the commission of any misdemeanor he shall cause process to issue from a court having jurisdiction to issue the same, (except the circuit court,) to the proper officer, directing him to subpœna the persons therein named likely to be acquainted with the commission of such felony or misdemeanor, and shall examine any person so subpœnaed

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before such court touching such offense, and if the facts thus elicited are sufficient to establish a reasonable presumption of guilt against the party charged, said court shall cause so much of said testimony as amounts to a charge of a felony or misdemeanor to be reduced to writing and subscribed and sworn to by such witness, whereupon such court shall cause process to issue for the apprehension of the accused as in other cases.*

Their duties enumerated.

Sec. 4. Such prosecuting and district attorneys within their respective jurisdictions shall conduct all prosecutions for felonies or misdemeanors and all suits on forfeited recognizances, resist applications for changing names, protect the interests of all persons of unsound mind, and superintend on behalf of a county or any of the trust funds, any suit in which the same may be interested or involved, and shall perform all other duties required by law, provided that in suits before a justice of the peace where the fine cannot exceed three dollars, the district attorney shall not receive a fee nor in any other case before a justice except when requested to prosecute the suit by the injured or complaining party.†

Failing to attend, court to appoint deputy, and his allowance.

Sec. 5. If any prosecuting or district attorney fail to attend any court of his circuit or district, as the case may be, the judge of such circuit or district, shall appoint some person to prosecute for such term who shall receive the docket fees of such term, and, if the appointment be made in the circuit court, such additional compensation as the court may deem reasonable to be drawn from the State Treasury on the allowance of the court and which allowance shall be deducted from the salary of such prosecutor.

Election and oath of office of dist. atty.

Sec. 6. In the election of district attorneys the vote shall be certified, and the commissions issued in the same manner as is provided by law in the election and commission of judges of the courts of common pleas, and the district attorney on filing his official bond shall take and subscribe on oath to support the Constitution of the United States, and of this State, and for the faithful discharge of the duties of his office, which shall be entered upon the order book of the court.

*See ante, R. S. Vol. 2, p. 363, 364.

† The jury returned a verdict of twenty dollars fine and two days imprisonment. The prosecuting attorney remitted all the imprisonment but six hours. *Held*, that the prosecuting attorney had no authority to enter the *remittitur*.—*State* vs. *Brown*, 7 Blackf. 45.

The prosecuting attorney is not entitled to a docket fee in case of an attachment for contempt for not obeying process.—*The State* vs. *Irwin*, 8 Blackf. 567.

When on a joint trial, the defendants were found guilty and separately fined under the statutes of 1831, page 187 and 252, the prosecuting attorney was entitled to a separate docket fee against each defendant.—*State* vs. *Cripe et al.*, 7 Blackf. 6.

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Grand jury—number—qualifications—how selected—when summoned.

CHAPTER 4.

AN ACT to limit the number of Grand Jurors, and to point out the mode of their selection, defining their jurisdiction, and repealing all laws inconsistent therewith.*

[APPROVED MARCH 4, 1852.]

No. and qualification of jurors.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That a grand jury shall consist of twelve members, all of whom shall be reputable freeholders or householders of the proper county, and taxable therein.

Sixty names to be deposited in a box.

SEC. 2. The board of commissioners of each county at their first regular session in each year, shall select from the tax duplicate of the preceding year, the names of sixty persons having the requisite qualifications, which shall be written on separate ballots, and placed in a box prepared for that purpose.

Names to be divided equally, &c.

SEC. 3. The names so selected shall be divided equally as nearly as possible among the civil townships of the county.

Who to draw,

SEC. 4. The clerk of the circuit court, in the presence of said board, shall draw by lot from said box the names of twelve persons, to serve as grand jurors.

Manner of drawing.

SEC. 5. In drawing said jurors, not more than one shall be drawn from the same township, if there be so many in the county; and if not, at least one shall be drawn from each township, after which the clerk shall continue to draw, observing the same rule, until the panel is filled.

Names to be recorded, and venire to be issued.

SEC. 6. The auditor shall record among the records of the board of commissioners, the names of the persons so drawn and shall deliver a certificate thereof to the clerk of the circuit court, who shall record the same on the order book of said court, and the persons so drawn shall compose the panel of grand jurors for the first term of the circuit court; and said clerk shall issue a venire to the sheriff accordingly.

Panel to be selected for each term.

SEC. 7. A panel of grand jurors shall be separately selected, at the same time and in the same manner, for each term of the circuit court to be filled in one year, but the same person shall not be selected for any two terms in the same year.

Failure to select.

SEC. 8. If the board of commissioners shall fail to select the grand jurors at their first annual session, they shall select at the next or any other session.

When summoned.

SEC. 9. All grand jurors shall be summoned to attend on the first day of the term for which they are selected, and shall have at least ten days' notice thereof, and for non-attendance

* See ante, R. S. vol. 2, p. 363.

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may be attached and fined, as for contempt, not exceeding three dollars.

Panel, how filled.

SEC. 10. A panel of grand jurors may be filled in whole or in part, when necessary, by summoning the requisite number of freeholders or householders of the proper county under the direction of the court, who shall in the discretion of the court be selected from persons residing in the several townships, unless in consequence of delay in filling the panel, or for other satisfactory reasons, the court shall otherwise direct.

Challenge.

SEC. 11. No challenge to the array of any grand jury shall be allowed, unless such challenge be supported by affidavit setting forth the causes therefor.

No plea in abatement, &c.

SEC. 12. No plea in abatement, or other objection shall be taken to any grand jury duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the court, amounts to corruption, in which case such plea or objection shall be received.

Felonies and misdemeanors defined.

SEC. 13. Crimes which may be punished with death or imprisonment in the State's prison, shall be denominated felonies, and all other offences against the criminal law, shall be denominated misdemeanors.

Jurisdiction of grand jury.

SEC. 14. The grand jury shall have cognizance of felonies only, but on an indictment for an assault or an assault and battery with an intent to commit a felony, the defendant may be convicted of a lesser offense.*

Nine may find a bill.

SEC. 15. A concurrence of nine grand jurors shall be necessary to find an indictment.

SEC. 16. All laws coming in conflict with this act, be and the same are hereby repealed.

CHAPTER 5.

AN ACT defining Felonies, and prescribing punishment therefor.

[APPROVED JUNE 10, 1852.]

Treason.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, Every person convicted of treason shall suffer death.

Murder.

SEC. 2. If any person of sound mind shall purposely and with premeditated malice, or in the perpetration, or attempt to perpetrate any rape, arson, robbery or burglary, or by administering poison,† or causing the same to be done, kill any human being, such person shall be deemed guilty of murder

* See ante, R. S. Vol. 2, p. 370 sec. 72. † See post, R. S. Vol. 2, p. 399.

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in the first degree, and upon conviction thereof shall suffer death.*

* An indictment for murder may be good without stating the accused to be a person of sound memory and discretion; and though the killing must be shown to be unlawful, the word "unlawful" need not be used.—*Jerry* vs. *The State*, 1 Blackf. 395.

The words "malice aforethought," used in former statutes of this State, in defining the crime of murder, comprised both expressed and implied malice. See 4 Blacks. Com. 198, 199. The second and seventh sections of this chapter are taken substantially from the statute of Ohio. The following points, some of them decided by the supreme court of that State, are appended:

Deliberate and premeditated malice, is where the wrong act was thought of and determined upon before it was done, though it need not be for any considerable time.—*The State* vs. *Turner*, Wright's Ohio R. 27; *The State* vs. *Gardiner*, *Ib.*, 392.

The deliberate purpose to kill, necessary to constitute the crime of murder in the first degree, is that deliberation used in the formation of the evil design, before the aggressive act is actually committed. Where the purpose is coolly and deliberately formed, and time has elapsed since the provocation, if any, for passion to subside, it is a question for the jury to decide, whether the slayer was influenced by heated passion, or by a deliberate and malicious artifice, to effect the destruction of his subject.—*The State* vs. *Town*, Wright's Ohio R. 75.

If the death was occasioned by the prisoner purposely, of deliberate and premeditated malice, the law pronounces him guilty of murder in the first degree. If the blow which occasioned the death was purposely and maliciously given by the prisoner, without deliberation and preconceived design, or was an act on which his mind had not previously resolved, the law defines the offense murder in the second degree. Malice and the purpose to kill are essential ingredients in both degrees of murder; the difference between them is determined by the presence or absence of deliberative purpose or premeditation.—*The State* vs. *Thompson*, Wright's Ohio R. 617.

NOTE.—The opinion expressed by the court in the cases above referred to, of the *State* vs. *Turner*, and the *State* vs. *Town*, that an intention to kill is necessary to constitute manslaughter, is decided not to be law in the case of *Montgomery* vs. *The State*, 11 Stanton (Ohio Rep.) 424.

The design or purpose to kill may be deduced from circumstances, the manner of inflicting the wounds, the instrument used, and its tendency to destroy life; if palpably calculated to take life, the party is supposed to intend so.—*The State* vs. *Gardiner*, Wright's R. 392.

The law presumes all killing malicious, and the circumstances of excuse must come from the defendant; but, when there are degrees of murder, the presumption of law against a prisoner, arising from the fact of killing, would only hold him guilty of murder in the second degree.—*The State* vs. *Gardiner*, Wright's Rep. 392: and *The State* vs. *Turner*, Ib. 20.

If the jury do not, in a murder case, specify in their verdict whether they find the prisoner guilty of murder in the first or second degree, or of manslaughter, the court will refuse to pass sentence, and will award a new trial, even if not asked for.—*The State* vs. *Town*, Wright's Rep. 75; *The State* vs. *Gardiner*, Ib. 392.

The following instructions, the same being relevant to the case, were given to the jury: "If homicide be committed in a sudden heat by the use of a deadly weapon, no provocation by mere words will reduce the killing to manslaughter. The question should never be, was there anger merely? but, was there legal provocation to such anger? The use of a dangerous weapon, under a provocation by words only, or under no provocation, is always evidence of malice aforethought. To constitute malice aforethought, it is only necessary that there be formed a design to kill; and such design may be conceived at the moment the fatal stroke is given, as well as a long time before. Malice aforethought means the intention to kill; and when such means are used as are likely to produce death, the legal presumption is, that death was intended." Held, that these instructions were correct.—*Beauchamp* vs. *The State*, 6 Blackf. 299.

A count in an indictment for murder, stated that the defendant made an assault on one G. B., and that the defendant, with a certain axe, &c., the said G. B., in and upon the *left* side of the head, and over the *left* temple of him the said G. B.,

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then and there feloniously and wilfully, and of his malice aforethought, did strike and beat, giving to the said G. B., then and there with the axe aforesaid, in and upon the *right* side of the head of him the said G. B., one mortal wound, &c., of which said mortal wound the said G. B., &c., on, &c., died: and so the jurors aforesaid, upon their oath aforesaid, say, &c. Held, that the count in the description of the offense, was repugnant and inconsistent with itself in a material part, and void.—*Dias* vs. *The State*, 7 Blackf. 20.

If an allegation in such count be sensible, and consistent in the place where it occurs, and be not repugnant to antecedent matter, it cannot be rejected as surplusage, though it be repugnant to a subsequent allegation.—*Ibid.*

An objection to such count for repugnancy in the description of the offense, cannot be removed by striking out the allegation which is inconsistent with the previous one, unless, after striking out the subsequent allegation, a legal description of the offense will still remain.—*Ibid.*

In an indictment for murder, where the death is alleged to have been caused by a wound, it is not necessary to describe the depth or breadth of the wound.—*Ibid.*

An indictment in such case concluded as follows: "And so the jurors aforesaid, upon their oath aforesaid, do say that the said S. D. (the prisoner) in manner and form aforesaid, feloniously and wilfully, and of his malice aforethought, did kill and murder, contrary," &c. Held, that this conclusion was insufficient for not designating the person murdered.—*Ibid.*

Although an indictment charge that the defendant feloniously and wilfully, and of his malice aforethought, did strike the deceased, &c., giving him, &c., a mortal wound, &c., yet if it do not contain the technical allegation that the defendant feloniously *murdered* the deceased, it is an indictment for manslaughter only, the word *murder* being a term of art which cannot be supplied in an indictment.—*Ibid.*

An indictment for murder alleged that the defendant, with a certain gun which he then and there in both hands held, &c., feloniously did shoot, &c. Held, that the omission of the word "his," before the word "hands," was no objection to the indictment.—*Ward* vs. *The State*, 8 Blackf. 101.

On the trial of an indictment for murder, the substance of the dying declarations of the deceased may be proved.—*Ibid.*

The overruling of a motion made by the defendant, on a trial of an indictment for murder, that the court instruct the prosecuting attorney, who had closed his evidence, to call certain witnesses, then present, is not error.—*Ibid.*

A juror's affidavit, in a case of murder, as to the view he took of the testimony, is inadmissible to impeach a verdict for the State.—*Ibid.*

To make a man a principal in a murder it is not necessary that he should inflict the mortal wound. It is sufficient if he be present, aiding and abetting the act. Nor is it necessary that there should be a particular malice against the deceased. It is sufficient if there be deliberate malignity and depravity in the conduct of the party.—1 Gallis C. C. Rep. 524.

The defendant in an indictment for murder or manslaughter may introduce evidence to show his general good and pacific character.—1 Cox's N. J. Rep. 429.

But when the evidence is positive and satisfactory to the jury, such good character cannot overcome the just presumption of guilt.—4 Mason's U. S. Rep. 505.

Indictment alleging that one Jewett murdered himself by hanging, which the prisoner counseled, &c.

Jewett was, according to the evidence, convicted of murder and sentenced to death. The prisoner was confined in the same prison and in an adjacent apartment, in such situation as to be able to converse with the deceased. The prisoner frequently advised Jewett to destroy himself, and thus disappoint the sheriff and people. Jewett did hang himself. Held, that the prisoner was guilty of murder.—13 Mass. Rep. 356.

If a seaman in a state of great debility and exhaustion, so that he cannot go aloft without danger of death, or enormous bodily injury, and the facts are known to the master, who, notwithstanding, compels the seaman, by moral or physical force, to go aloft, persisting with brutal malignity in such course, and the seaman falls from the mast and is drowned thereby, it is murder in the master.—4 Mason's U. S. Rep. 505.

A. seeks B. and threatens his life; they meet; a quarrel ensues; B. strikes A. with his fist; they separate; A. attempts to arm himself with a stick, which

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he is unable to do; again stoops to raise another stick or billet of wood of a dangerous kind; whilst stooping B. stabs him. Held, that this was not murder.—5 Yerg. Tenn. Rep. 453.

If a prisoner die by the cruelty or neglect of the jailor, it is murder.—Fost. 321.

Where the keeper of a place of confinement obliged a party in his custody to lodge in a room with another infected with the small pox, by which means he took it and died, it was holden to be wilful murder.—Fost. 322.

And where another person in the same office confined his prisoner in a low, damp, and unwholesome room, without any of the common necessaries of decency and health, so that he contracted distempers which proved ultimately fatal, it was held to be murder.—2 Campb. 650.

If a master neglect to furnish his apprentice with sufficient food, or neglect him when ill, so that he dies, he will be guilty of murder.—*Ibid.*

The laying noisome and poisonous filth at a man's door, which kills him by corrupting the air which he breathes, is murder.—1 Hale 432.

If one in attempting to commit a felony, kill another accidentally, it will be murder; but if the attempt is to commit an act amounting only to a misdemeanor, it will be manslaughter.

When the party shoots at one man and kills another; and where poison is laid for one person and is taken by another, it is murder.—1 Hale 466.

If medicine be given to a female to procure abortion, which kills her, the party administering it will be guilty of her murder.—1 Hale, 429.

If a woman in consequence of being ravished, die, it will be murder.—1 Leach 96.

Indictment for the murder of one Clark. At the trial the principal facts were not contested. But the defense set up was the insanity of the prisoner at the time of committing the homicide. It appeared, that for a considerable time before the fatal act, Drew had been in the habit of indulging himself in very gross and almost continual intoxication; that about five days before it took place, he ordered all the liquor on board to be thrown overboard, which was accordingly done. He soon afterwards began to betray great restlessness, uneasiness, fretfulness and irritability; expressed his fear that the crew intended to murder him; and complained of persons who were unseen, talking to him, and urging him to kill Clark, and his dread of so doing. He could not sleep, but was in almost constant motion during the day and night. The night before the act, he was more restless than usual, seemed to be in great fear, and said, that whenever he laid down there were persons threatening to kill him if he did not kill the mate, &c. &c. In short, he exhibited all the marked symptoms of the disease brought on by intemperance, called *delirium tremens.*

By the Court, STORY, J.—We are of opinion that the indictment upon these admitted facts cannot be maintained. The prisoner was unquestionably insane at the time of committing the offense. And the case made at the bar is, whether insanity, whose remote cause is habitual drunkenness, is or is not, an excuse in a court of law for a homicide committed by the party, while so insane, but not at the time intoxicated or under the influence of liquor. We are clearly of opinion, that insanity is a competent excuse in such a case. In general, insanity is an excuse for the commission of every crime, because the party has not the possession of that reason which includes responsibility. An exception is, when the crime is committed by a party while in a fit of intoxication, the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct, to shelter himself from the legal consequences of such crime.

But the crime must take place and be the immediate result of the fit of intoxication, *and while it lasts;* and not, as in this case, a remote consequence, superinduced by the antecedent exhaustion of the party, arising from gross and habitual drunkenness. However criminal, in a moral point of view, such an indulgence is, and however justly a party may be responsible for his acts, arising from it, to Almighty God, human tribunals are generally restricted from punishing them, since they are not the acts of a reasonable being. Had the crime been committed while Drew was in a fit of intoxication, he would have been liable to be convicted of murder. As he was not intoxicated, but merely insane from an abstinence from liquor, he cannot be pronounced guilty of the offense. The law looks to the immediate, and not to the remote cause; to the

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actual state of the party and not to the causes which remotely produced it. Many species of insanity arise remotely from what in a moral view is a criminal neglect or fault of the party, as from religious melancholy, undue exposure, extravagant pride, ambition, &c. Yet such insanity has always been deemed a sufficient excuse for any crime done under its influence.

The prisoner was acquitted.—5 Mason's U. S. Rep. 28.

Drunkenness does not incapacitate a man from forming a premeditated design of murder; but as it clouds the understanding and excites passion, it may be evidence of passion only, and want of malice and design.—Addis. 257.

If a number of persons conspire together to do an unlawful act, and death happen in the prosecution of the design, it is murder in all. If the unlawful act was a trespass, the murder, to affect all, must be done in the prosecution of the design. If the unlawful act be a felony, it will be murder in all, although the death happen collaterally, or beside the principal design.—1 Gallis C. C. R. 524.

If several persons conspire to seize, with force and violence, a vessel, and run away with her, and if necessary, to kill any person who shall oppose them in the execution of the design, and death ensue in the prosecution of the design, it is murder in all who are present aiding and abetting in executing the design.—*Ibid.*

Malice, in the sense of the law, means wilfulness.—4 Mason's C. C. R. 115.

The legal meaning of "malice aforethought" in cases of homicide, is not confined to homicide committed in cold blood with settled design and premeditation, but extends to all cases of homicide, however sudden the occasion, where the act is done with such cruel circumstances as are the ordinary indications of a wicked, depraved and malignant spirit; as where the punishment inflicted by a party, even upon provocation, is outrageous in its nature and continuance, and beyond all proportion to the offense; so that it is rather to be attributed to a diabolical malignity and brutality, than to human infirmity. And much, in these cases, depends on the instrument employed—whether dangerous to life or not.—2 Mason's C. C. R. 91.

It may safely be laid down as a general rule, that no *words* or *gestures*, however opprobrious or provoking, will be considered in law to be provocation sufficient to reduce homicide to manslaughter, if the killing be effected with a deadly weapon, or an intention to do the deceased some grievous bodily harm be otherwise manifested; but if effected with a blow of a fist or of a stick, or other weapon not likely to kill, it is manslaughter only.—Arch. Cr. Pl. 325; 1 Hawk. 210, 78.

The following cases have been decided as coming within this rule. If a man does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended; (4 Black. Com. 197;) as where a person carried his sick father, against his will, in a severe season, from one town to another, by reason whereof he died; (1 Hawk., 31, sec. 5; 1 Hale, 431, 432;) or where a harlot left her child in an orchard, covered only with leaves, in which condition it was killed by a kite; (1 Hale, 431; 1 Hawk. P. C. chap. 31, sec. 6;) or where a child was placed in a hog-sty, where it was destroyed; (1 East. P. C. 226;) or where parish officers shifted a child from parish to parish, until it died for want of care and sustenance; (Palmer, 545;) forcing a person to do an act which is likely to produce his death, and which does produce it; and threats may constitute such force, (1 Russ. Crim. L. 425.) In these cases, it was considered that the acts so done wilfully and deliberately, were of malice prepense. But it is a general principle that there must be some external violence, or *corporal* damage to the party; and therefore, where a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such a passion of grief or fear, that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice.—1 Hale, 427, 429; 1 East. P. C. 225.

He who kills another, upon his desire or command, is, in the judgment of the law, as much a murderer as if he had done it of his own head; and the person killed is not looked upon as a *felo de se*, inasmuch as his assent was merely void, being against the laws of God and man.—1 Hawk. chap. 27, sec. 6; Kielw. 136; Moor, 754; 1 Russ. on Cr. 424, 426.

The crime of an accessory before the fact to a murder, is murder. (4 Wend. 255.) He that counsels, commands, or directs, the killing of any person, and i s

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himself absent at the time of the fact being done, is an accessory to murder before the fact. (1 Hale, P. C. 435.) And though the crime be done by the intervention of a third person, he that procures it to be committed is an accessory before the fact. (Fost. 125.) If A. advise B. to kill another, and B. does it in the absence of A., in such case B. is principal and A. is accessory to the murder; or rather, they are, in effect, both principals; and this holds, even though the party killed be not in being at the time of the advice given; as if a man advise a woman to kill her child as soon as it shall be born, and she afterwards does so, he is an accessory to the murder. (1 Russ. 432.) It is a rule, that he who in any wise commands or counsels another to commit an unlawful act, is accessory to all that ensues upon that unlawful act. Thus, if A. commands B. to beat C., and B. beat him so that he dies, A. being absent, B. is guilty of murder as principal, and A. as accessory, the crime having been committed in the execution of a command which naturally tended to endanger the life of another. (1 Hale, 435; 2 Hawk. c. 39, sec. 18, 4 Blacks. Com. 37.) But if the crime committed be not the direct and immediate effect of the act done in pursuance of the command, or if the act done varies in substance from that which was commanded, the party giving the command cannot be deemed an accessory to the crime. 1 Russ. on Cr. 433.

If several persons were present at the death of a man, they may be guilty of the different degrees of homicide; as one of murder, and another of manslaughter; for if there be no malice in the party striking, but malice in an abettor, it will be murder in the latter, though only manslaughter in the former. 1 East. P. C. 350.

If a private person attempt to arrest one who commits a felony in his presence, or interferes to suppress an affray, and being resisted, necessarily kills the person resisting, this is also justifiable homicide. (1 Hale, 481, 484; Fost. 274.) Still there must be an apparent necessity for the killing; for if the officer or private person were to kill after the resistance had ceased, or if there were no reasonable necessity for the violence used on his part, the killing would be manslaughter at least. (Arch. Cr. Pl. 333.) Also, in order to justify an officer or private person, in these cases, it is necessary that he should, at the time, be in the act of legally executing a duty imposed upon him by law, and under such circumstances that if the officer or private person were killed, it would have been murder; for if the circumstances of the case were such that it would have been manslaughter only to have killed the officer or private person, it would be manslaughter at least in the officer or private person to kill the party resisting. (Arch. Cr. Pl. 334; Fost. 318; 1 Hale, 490.) Therefore, if the warrant is illegal and void upon the face of it, or issued with a blank in it, and the blank is afterwards filled up, or issued with an insufficient description of the defendant—as for instance, if it were to take the son of J. S., or attempted to be executed against C., instead of B.,—the officer or private person would not be justified in killing the person resisting.—Arch. Cr. Pl. 330.

In executing their duty, it often becomes a question in what cases constables and other peace officers are justified in breaking open windows and doors. In no case whatever is an officer justified in breaking open an outer door or window, unless a previous notification has been given, and a demand of entrance made and refused. (Fost. 320; Hawk. C. L. 2, chap. 14, sec. 1.) Where a felony has been actually committed, or a dangerous wound given, a peace officer may justify breaking an entrance door to apprehend the offender, without a warrant; but in cases of misdemeanor and breach of the peace, a warrant is required. It likewise seems to be the better opinion that mere suspicion of felony will not justify him in proceeding to this extremity unless he be armed with a warrant. (Fost. 320, 321; 1 Russ. 520; Hawk. C. L. 2, chap. 14, sec. 7.) It is to be observed that the protection from arrest by breaking open an outer door only extends to arrests in the first instance; for if a man legally arrested (and laying hands on the prisoner and pronouncing words of arrest, constitute an actual arrest,) escape from the officer and take shelter in his own house, the officer may, upon fresh pursuit, break open the outer door in order to take him, having first given due notice of his business, and demanded admission, and been refused. If it be not, however, on fresh pursuit, it seems that the officer should have a warrant from a magistrate.—1 Hale's P. C. 459; Fost. 320; 1 East. 324.

In every case, whether civil or criminal, in which doors and windows may be broken open in order to make an arrest, there must be a previous notification of the business, and a demand to enter, on the one hand, and a refusal on the other,

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before the parties proceed to that extremity. (Fost. 320.) Where a felony has been committed, or a dangerous wound given, the party's house is no sanctuary for him; and the doors may be forced, after the notification, demand and refusal. (Fost. 320; 1 Hale, 459.) So where a minister of justice comes armed with process founded on a breach of the peace, doors may be broken. (1 Hale, 459; Fost. 320.) And the rule is the same as to process of contempt, (14 East. 157,) and as to many other cases. (1 Russ. on Cr. 519.) (*Idem, ibid.*) If there be an affray in a house, however, and the constable demand entrance with the view of keeping the peace, and be refused by those within, he may break open the doors. (2 Hale, 95.) But this mode of proceeding does not extend to civil suits. With respect to civil process, the principle that a man's house is his castle, is admitted; and in such cases an officer cannot justify breaking an outer door or window, to execute the process. (Cro. Car. 537; Fost. 319; 1 Hale, 458.) This rule, however, only applies to the breach of *outer* doors or windows; to a breach of the house for the purpose of arresting the occupier or any of his family; and to arrests in the first instance.

In a case of a riot or rebellious assembly, the officers endeavoring to disperse the mob, are justified in killing them, if necessary to suppress the riot.—4 Blacks. Com. 179; 1 Hale, 495.

In cases where a peace officer attempts, without a warrant, to apprehend a person on suspicion of felony, and the suspected person is killed, the question will be whether the officer had reasonable grounds for supposing him guilty of the charge. If it appear that he had, he should be acquitted, although it turns out that the person he was attempting to arrest was, in fact, innocent of the charge. Although the mere suspicion of felony will not justify a peace officer in breaking an outer door to apprehend the offender, unless the officer is armed with a warrant; yet, according to Lord Hale, the officer would be justified in killing the party, if he fly, and cannot otherwise be apprehended. (1 Hawk. P. C., c. 28, sec. 12; Fost. 320; 1 Hale, 481; 2 Id. 72, 79, 218.) But it is said that this must be understood only of arrest by officers, and does not extend to arrests by private persons of their own authority. (2 Hale, 84; 1 Russ. on Cr. 547.)

Where a private person lends his assistance to an officer, whether commanded to do so or not, he is under the same protection as the officer himself.—Fost. 309.

A man may repel force by force in defense of his person, habitation or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, such as rape, robbery, arson, burglary, or the like. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger; and if he kill him in so doing, it is justifiable self-defense; as, on the other hand, the killing by such felons of any person so lawfully defending himself, will be murder. But a bare fear of any of these offenses, however well grounded, as that another lies in wait to take the party's life, unaccompanied by any overt act indicative of such an intention, will not warrant him in killing that other, by way of precaution, there being no actual danger at the time.—1 East. P. C. 271, 272; Fost. 274.

Not only is the party himself, whose person or property is the object of the felonious attack, justified in resisting, in the manner above mentioned, but a servant or any person who may be in the house at the time, may lawfully interpose in order to prevent the intended mischief. Thus, in the instance of arson and burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do, but subject to the same limitations. — Roscoe's Crim. Ev. 638.

Where an attempt is made to murder, or to maim, or to rob, or to ravish, or to commit burglary, or to set fire to a dwelling house, if the attack be made by the assailant with violence, and by surprise, any person in the house at the time may lawfully put him to death.—Fost. 274; 1 East. P. C 273.

If one come to beat another, or to take his goods, as a trespasser, though the owner may justify a battery for the purpose of making him desist, yet, if he kill him, it will be manslaughter in the third degree. (1 Hale, 485, 486; 1 East. 272.) In cases of this kind the law does not admit the force of the provocation to be sufficient to warrant the owner of the property in making use, in repelling the trespasser, of any deadly or dangerous weapon. (Roscoe's Crim. Ev. 642: 2 Halst. Rep. 220; 4 Mass. Rep. 391; 3 Roger's Rec. 77.) Thus, if upon the sight of a person breaking his hedges, the owner were to take up a hedge-stake and knock him on the head and kill him, this would be murder;

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because the violence was much beyond the provocation. (Fost. 291; 1 East. 228.) But in defense of a man's *house*, the owner, or his family, may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defense, a man who attacked him personally; with this distinction, however, that in defense of his house he need not retreat, as in other cases of self-defense; for that would be giving up his house to his adversary.—1 Hale P. C. 486.

With regard to the point of time at which an officer is justified, in case of resistance, in resorting to measures of violence, it is laid down, that although in the case of common persons, it is their duty, when they are assaulted, to fly as far as they may, in order to avoid the violence, yet an officer, if assaulted in the execution of his duty, is not bound to give way; and if he kills his assailant it is adjudged homicide in self-defense. (1 Hale, 481.) But, though it be not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. And where no resistance at all is made, and the officer kills, it will be murder. So if the officer kill the party after the resistance is over, and the necessity has ceased, it is manslaughter at least; and if the blood had time to cool, it would, it seems, be murder.—Roscoe's Crim. Ev. 627; 1 East. 297.

The provision of the statute respecting the correcting of a child or servant is in accordance with the rule of the common law; according to which parents, masters, and other persons having authority in the domestic tribunal, may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument used, the death ensuing will be either murder or manslaughter, according to the circumstances of the case. Where the act is done with a dangerous weapon, improper for correction, and likely (the age and strength of the party being duly considered,) to kill or maim; such as an iron bar, a sword, a pestle, or great staff; or where the party is kicked to the ground, and his belly stamped upon, whereby he is killed, it will be murder. (Russ. on Cr. 460.) Though the correction exceeds the bound of moderation, yet the court will pay regard to the nature of the provocation, where the act is manifestly accompanied with good intent, and the instrument is not such as will, in all probability, occasion death, though the party be hurried to great excess.—Roscoe's Crim. Ev. 584.

Homicide by misadventure, or, as the statute expresses it, by accident and misfortune, is where one doing a lawful act, without any intention of bodily harm, and using proper precaution to prevent danger, unfortunately happens to kill another person. (1 East. P. C. 224, sec. 8, 260, sec. 36; Fost. 258; 1 Hawk. C. L. c. 29, sec. 1.) The act must be lawful, and done by lawful means, otherwise the homicide will amount to murder or manslaughter. (1 Russ. on Cr. 539.) And it must be done with usual and ordinary caution to prevent danger. It must also be done without any unlawful intent; for otherwise, the mere legality of the act, considered abstractedly, would be no more than a mere cloak or pretense, and consequently would avail nothing. (1 East. 261, sec. 36.) Thus, if people, following their common occupations, use ordinary precaution to prevent danger, and nevertheless happen, unfortunately, to kill any one, such killing will be excusable homicide. As if workmen throw stones, rubbish or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed, this will be homicide by accident and misfortune only, if it were done in a retired place where there was no probability of persons passing by, and none had been seen about the spot before, or if timely and proper warning were given to such as might be below. (1 Russ. 535.) So if a person drive a carriage over another and kill him, if the accident happened in such manner that no want of due care could be imputed to the driver, it will come within the description of accidental homicide.—Fost. 263; 1 Hale, 476.

Where one lays poison to kill rats, and another person takes it and dies, this is accidental homicide; yet it must be understood to have been laid in such manner and place as not easily to be mistaken for proper food; for that would betoken great inadvertence, and might, in some cases, amount to manslaughter.—1 Russ. on Cr. 540.

The most grievous words of provocation, contemptuous and insulting actions or gestures, or trespass against lands or goods, will not free the party killing from

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Death by duel to be murder.

SEC. 3. If either party to a duel be killed, the survivor shall be deemed guilty of murder in the first degree, and shall suffer death.

Imprisonment for life.

SEC. 4. Any person convicted of treason, or murder in the first degree, may instead of being sentenced to death, in the discretion of the jury, be imprisoned in the State prison during life.

Duel out of the State, &c.

SEC. 5. If any person shall by previous appointment made within, fight a duel without the State, and in so doing shall inflict a mortal wound upon any person, whereof the person so injured, shall die within this State, such person so offending shall be deemed guilty of murder in the first degree in the county where such death shall happen, and shall suffer death or be imprisoned in the State prison during life.

Manner of execution.

SEC. 6. Any person convicted of treason or murder, and sentenced to be hung shall be privately executed and at such execution, the officer executing such sentence, shall summon as witnesses thereof, a judge of a court of record, the clerk of the circuit court of the county and any five [twelve] other persons he may designate; but in the event such judge and clerk, or either of them fail to attend at such execution, such officer shall designate two other persons in their stead, and after the execution of such sentence, such witnesses shall give to such sheriff a certificate thereof.*

Murder in the second degree

SEC. 7. If any person shall purposely and maliciously, but without premeditation, kill any human being, every such person shall be deemed guilty of murder in the second degree, and on conviction thereof, shall be imprisoned in the State prison during life.†

the guilt of murder, if upon such provocation a deadly weapon was made use of, or an intention to kill, or do some great bodily harm, was otherwise manifested. (1 Russ. on Cr 434.) But if no such weapon be used, or intention manifested, and the party so provoked give the other a box on the ear, or strike him with a stick or other weapon not likely to kill, and kill him unluckily and against his intention, it will be excusable homicide.—Fost. 291; 1 East. 233.

Where an assault is made with violence, or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, it will be excusable homicide, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, during the brief madness occasioned by the provocation.—Kel. 135; 4 Blacks. Com. 191; 1 East. 233, sec. 20.

Where a man finds another in the act of adultery with his wife, and kills him in the first transport of passion, he is excusable.—Sty. 467; 1 Russ. on Cr. 487.

The dying declarations of the deceased are receivable in evidence, if the court be satisfied that he was conscious of being in a dying state at the time he made them, (Matt. Dig. Cr. L. 254; 1 Leach, 502; 3 Car. & Payne, 629,) and was sensible of his awful situation, (3 Car. & P. 529,) even though he did not actually express any apprehension of danger, (1 East's P. C. 358; 2 Leach, 561,) and his death did not ensue until a considerable time (in this case eleven days) after the declaration was made. (Ry. & Moo. C. C. 97.) And though what the murdered person says *in articulo mortis*, as to facts, is admissible, what he says as matter of opinion, is not.—Car. C. L. 233; Matt. Dig. 254.

* See ante, R. S. Vol. 2, p. 379. † See note to sec. 2 of this chapter.

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Crime and punishment—felonies—assault and battery with intent, &c.

Manslaughter.

SEC. 8. If any person shall unlawfully kill any human being without malice express or implied either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act, such person shall be deemed guilty of manslaughter, and upon conviction thereof, shall be imprisoned in the State prison not more than twenty-one nor less than two years.*

Assault with intent to commit felony.

SEC. 9. Every person who shall perpetrate an assault, or an assault and battery, with intent to commit a felony, shall, upon conviction thereof, be imprisoned in the State prison not exceeding fourteen, nor less than two years, and be fined not exceeding one thousand dollars. †

* See ante, R. S. vol. 2, p. 388, and notes.

Where death evidently ensues from heat of blood, on some grievous provocation, the law, indulgent to the weakness and infirmity of our nature, reduces the offense from murder to manslaughter. The great distinction seems to arise from the inquiry whether the force or weapon used by the prisoner was likely to produce death. Thus, where a park-keeper, finding a boy stealing wood in his master's ground, bound him to a horse's tail and beat him, on which the horse took fright and dragged him on the ground till he died, (4 Hale, 554); where a tutor tramped on the breast of his scholar, (4 Bl. Com., 199); where a master struck his servant with an iron bar, (Kel. 64);—they were respectively holden to be murderers. But where the instrument seemed proper for correction, or for punishing a violent insult, as where a father for some heavy offense beat his son with a rope, in consequence of which he died; where a man found a trespasser on his ground and beat him until he unluckily killed him; and where a shepherd, being angry with his boy, threw a stake at him which lay near him on the ground, and killed him, it was holden to be manslaughter.

A father seeing his son return covered with blood from having been beaten by another boy, took a staff, ran three-quarters of a mile, and beat his son's adversary with it so severely as to occasion his death, it was held to be manslaughter. The staff in this case was a small wand or cudgel, according to some reports.—*Ld. Raym*, 1498.

Where a woman threw a stool at her daughter-in-law, on some ground of irritation, and killed her, she was held to be guilty of manslaughter only.—1 Leach, 368.

If one with a sword drawn make a pass at another whose sword is undrawn, and a combat ensue, if the former be killed, it will be only manslaughter in the latter, but if the latter fall, it will be murder in the former, for by making the pass before his adversary's sword was drawn, he evinced an intention to destroy him.

Where a man threw a bottle at the head of his opponent, upon the occasion of some angry words, and immediately drew his sword, and when his adversary returned the bottle, stabbed him, it was holden to be murder, because he drew previous to the first aggression.—Ld. Raym. 1489.

If the resentment be inadequate to its cause—if dangerous instruments be used under pretence of correction, even where correction is lawful—or be the provocation what it might, if time for reflection intervened—if previous malice can be shown—if there be traces of deadly malice from whatever cause—the offense of homicide is murder; but, if the cause be but sudden passion overstepping its bounds, correction well intended though too severe, the law reduces the crime to manslaughter.—2 Chitty's Crim. Law, 485.

If a physician display gross ignorance, or criminal inattention, or culpable rashness, in the treatment of his patient, he is criminally responsible.—Ros. Crim. Ev., 588.

A case was cited by counsel where a man who was drunk went and delivered a woman, who by his mismanagement died, and he was convicted.—4 Car. & P., 404. And where a person grossly ignorant undertook to deliver a woman, and killed the child in the course of the delivery, it was held that he was rightly convicted of manslaughter.—1 Moody C. C., 346.

† An indictment for an assault with intent to commit a felony, must show

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Poisoning.

SEC. 10. Every person who shall administer, or procure to be administered, any poison to any other human being, with intent to kill the person to whom the same shall be administered, if death do not ensue, upon conviction thereof, shall be pun-

with certainty the particular felony intended to be committed.—*The State* vs. *Hailstock*, 2 Blackf. 257.

In an indictment a count charging a robbery from A., may be joined with a count charging an assault and battery with intent to rob A.—*McGregg* vs. *The State*, 4 Blackf. 101.

A charge of an assault and battery, with intent to kill, is only a charge of an assault and battery; the words "with intent to kill" being surplusage.—*Sweetser* vs. *The State*, 4 Blackf. 528.

A person may be indicted, under sec. 7, chap. 53, R. S. 1843, for an assault and battery with intent to commit murder in the second degree.—*The State* vs. *Kesler et al.*, 8 Blackf. 575.

To maintain an indictment for an assault and battery with intent to commit murder, the assault must be such that if death had ensued it would have been murder.—*R.* vs. *Milton*, 1 East. P. C. 411; *R.* vs. *Dawson*, 3 Stark. 62.

If upon an indictment for an attempt to commit a rape, it be proved that a rape was actually committed, the defendant must be acquitted.—*R.* vs. *Harmwood*, 1 East. 411, 440.

It has been decided that a prisoner could not be convicted of an attempt to shoot, by drawing the trigger of a gun which was not primed at the time. (Carr's Case, Russ. and Ry. 377.) So. if the touch-hole is plugged. (5 Car. and P. 159.) These cases were decided upon the principle that guns so circumstanced ought not to be considered loaded guns, within the meaning of the act. (5 Car. and P. 126.) Where the prisoner, by snapping a percussion cap, discharged a gun barrel detached from the stock, this was held "a shooting at" with "loaded arms" within the statute. (6 Car. and P. 394.) But to constitute the offense of attempting to discharge loaded fire-arms, they must be so loaded, as to be capable of doing the mischief intended. So that if part of the loading has fallen out, though without the prisoner's knowledge, and that which remains is inadequate to effect the mischief, the case is not within the act.—1 Russ. on Cr. 596.

The intention is not, in general, capable of positive proof. It can only be implied from overt acts; and every man is supposed to intend the necessary consequence of his own acts. Therefore, if it cannot be inferred from the facts and circumstances which, together with it, constitute the offense, other acts of the defendant, from which it can be implied to the satisfaction of the jury, must be proved at the trial.—Arch. Cr. Pl. 104.

Where the prisoner is charged with doing some act, with intent to murder, and from the circumstances it appears that if death ensued it would have been manslaughter only, he must be acquitted on the ground that the intent must be proved as laid.—1 East. P. C. 411.

It may be stated as a general rule, that a man is answerable for his acts; and therefore, if intending to stab A., he stab B., he may be indicted for stabbing B., with intent, &c. and the facts will sustain the indictment. But if it be doubtful whether the act was done by accident or design, other circumstances may be given in evidence to prove the intent. (Arch. Cr. Pl. 354.) Where the question is, whether the shooting at another was by accident or design, evidence that the prisoner at another time malicously shot at the prosecutor, is admissibl .—Russ. and Ry. 531.

If a man intend to commit one kind of felony, and, in the prosecution of that, commit another, the law will connect his felonious intention with the felony actually committed, though different in species from that he originally intended.—1 East. P. C. 400.

The assault must be made upon the person intended to be robbed. (Roscoe's Cr. Ev. 754; 3 Chit. Cr. L. 807; 1 Russ. on Cr. 616) But no actual demand of money or property is necessary upon the charge of assaulting with deadly weapons, &c. with intent to rob. (1 Russ. on Cr. 617; Arch. Cr. 230.) The intent to rob is a material part of the offense. Menaces, threats, violence, and in short, whatever conduct, which, if it had been followed by a taking of property, would have constituted robbery, will in this case be evidence of an attempt to rob.—Arch. Cr. Pl. 230; Roscoe's Ev. 754; 1 East. P. C. 418.

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ished by imprisonment in the State prison not less than three years.*

* It has been decided in England, that to constitute an administering, it is not necessary that the poison should be delivered by the hand of the prisoner. Therefore, where a servant put poison into a coffee-pot, and when her mistress came down to breakfast, told her that she had put the coffee-pot there for her, and the mistress drank of the poisoned coffee, this was held "causing the poison to be taken," within the statute. (4 Car. and Payne, 359.) Where A. sent poison intending it for B., with intent to kill B., and it came into the possession of C., who took it, but did not die, this was held to be a case within the statute.—6 Car. and Payne, 161.

The following statement of the symptoms exhibited by persons poisoned, condensed chiefly from Beck's Medical Jurisprudence, may not prove uninteresting:

Corrosive or Acrid Poisons.—If the patient has observed that the food or drink, which was its vehicle, had not its ordinary taste,—if he has felt a sudden heat, an irritation or an extraordinary and sudden dryness at the root of the mouth and œsophagus, with a constriction or sense of strangling in those parts—if this be succeeded by an obstinate anxiety to vomit, and sharp pains in the stomach and intestines—if there be great thirst, copious discharges by vomiting and by stool, accompanied with tenesmus and followed by hiccough, by a sense of constriction across the diaphragm, and difficulty of breathing—if there be great pain in the region of the kidneys, followed by stranguary—if convulsions, cramps of the hands, trembling of the lips, extinction of the voice, repeated faintings, cold sweats, and a small, chorded and irregular pulse be present; and if, in addition to all these, the intellectual faculties remain perfect until the disease arrives near its termination, we may reasonably suspect the presence of a corrosive or acrid poison.

Narcotic Poisons.—Effects: Stupor, numbness, a great inclination to sleep, coldness and stiffness of the extremities, a cold sweat of fœtid or greasy nature, swelling of the neck or face, protrusion of the eye, with a haggard cast of countenance, thickening of the tongue, with frequent vertigo, weakened eyesight, or objects presented to it in a fantastic manner, coma, delirium, general debility, palpitation of the heart, the pulse at first full and strong, but afterwards unequal and intermittent, paralysis of the lower extremities, retraction of the lips, general swelling of the body, and dilatation of the veins. At the conclusion of the disease, slight convulsions are sometimes present.

Narcotico-Acrid Poisons.—These are distinguished by a combination of several of the foregoing symptoms. They are agitation, pain, acute cries, sometimes stupor, and convulsive motions of the muscles of the face, jaws and extremities—vertigo, and occasionally extreme stiffness of the limbs, and contraction of the muscles of the thorax—the eyes red and starting from their sockets, the pupils frequently dilated—insensibility to external impressions—mouth full of foam—tongue and gums livid, nausea, vomiting, frequent stools. Often these symptoms attack in paroxysms, and the patient is left comparatively easy for a few moments.

Astringent Poisons.—Symptoms: Severe griping in the stomach or abdomen, occasional vomiting, incessant cough, and wasting or paralysis. The absence of fever, and the protracted nature of the disease, unless very large quantities have been taken, are also distinctive marks of the disease.

These are the ordinary symptoms accompanying the exhibition of poisons, according to their classification, in reference to whether they are corrosive, narcotic, narcotico-acrid, or astringent. But these should only excite suspicion and stimulate investigation, never produce conviction. They may occur in diseases induced by other causes. The evidence they furnish should be strongly corroborated by the tests recognized in medical jurisprudence. Whenever, therefore, they are met with, strict inquiries should be made into the relations of the person suspected of being poisoned with those about him, as to the probable existence of a motive to perpetrate the crime, &c. All articles of food and drink of which the patient or deceased partook shortly previous to the occurrence of the symptoms should be carefully preserved. But above all, a scientific physician—not a quack—should be immediately consulted; for upon his investigations will the result, in the main, depend.

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Crime, &c.—felonies—poisoning—mayhem—kidnapping—rape.

Same.

SEC. 11. Every person who shall mingle poison with any food, drink or medicine, with intent to injure any human being, or who shall poison any spring, well, or reservoir of water, with such intent, shall, upon conviction thereof, be punished by imprisonment in the State prison not less than two, nor more than fourteen years.

Malicious mayhem.

SEC. 12. Every person who, on purpose and of malice aforethought, shall unlawfully disable the tongue, put out an eye, cut, or bite off the nose, ear, lip, or other member of any person, with intent to disfigure or disable such person, shall be deemed guilty of malicious mayhem, and, upon conviction thereof, shall be imprisoned in the State prison for a term not less than two nor more than fourteen years, and be fined not exceeding one thousand dollars.*

Kidnapping.

SEC. 13. Every person who shall forcibly steal and take, or forcibly and unlawfully arrest any person, and convey such person to parts without the State of Indiana, or aid or abet therein, or who shall forcibly and unlawfully take or arrest, or aid or abet in forcibly and unlawfully taking or arresting any person, with intent to take such person to parts without the State, without having first established a claim upon the services of such person, according to the laws of this State or of the United States, shall be deemed guilty of kidnapping, and, upon conviction thereof, shall be fined not less than one hundred nor more than five thousand dollars, and be imprisoned in the State prison not less than two nor more than fourteen years.

Rape.

SEC. 14. Every person who shall unlawfully have carnal knowledge of a woman against her will, or of a woman child under twelve years of age, shall be deemed guilty of a rape, and, upon conviction thereof, shall be imprisoned in the State prison not exceeding twenty-one nor less than two years;

* To constitute a slitting the nose, it is not necessary that the nostrils should be perforated, for a wound across the upper part of the nose on a level with the eyes, if it cuts the flesh, and divides the frontal vessels of the forehead, is sufficient.—1 Leach, 55. 6 Harg. St. Tr., 223.

If the design was to murder *by maiming*, and the party, though wounded, recover, this deeper guilt will be no excuse, for the primary intent to maim will not be merged in the ultimate design to kill, (6 Harg. St. Tr., 211.) And the question of intent is matter of fact for the consideration of the jury, and not a point of law for the decision of the judge, (ibid.) It is not necessary that the intention to maim should be directed against any particular individual; for if it be general against any person who may resist an unlawful purpose, the offender will be liable, though the party injured be a stranger.—1 Leach, 55. 1 East, P. C., 396.

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and in prosecutions for such offense, proof of penetration shall be sufficient evidence of the commission thereof.*

Seduction.

SEC. 15. Any person who, under promise of marriage, shall have illicit carnal intercourse with any female of good repute for chastity, under the age of twenty-one years, shall be deemed guilty of seduction, and, upon conviction, shall be imprisoned in the State prison for not less than one, nor more than three years, and fined, not exceeding five hundred dollars, or be imprisoned in the county jail not exceeding six months; but in such case the evidence of the female must be corroborated to the extent required, as to the principal witness, in cases of perjury.†

Abduction, for prostitution.

SEC. 16. If any person shall entice or take away any female, of previous chaste character, from wherever she may be, to a house of ill fame, or elsewhere, for the purpose of prostitution, and every person who shall advise or assist in such abduction, shall be imprisoned in the State prison not less than two nor more than five years, or may be imprisoned in the county jail not exceeding one year, and be fined not exceeding five hundred dollars; but in such case the testimony of such female shall not be sufficient unless supported by

* For form of indictment see R. S. vol. 2, p. 356.

If the description of rape in an indictment leave out the word "unlawfully," but be in accordance with the common law definition of the offense, it is sufficient. —*Weinzorpflin* vs. *The State*, 7 Blackf. 186.

If it be proved that the defendant is under 14 years of age, he must be acquitted; for a boy under that age is presumed in law to be incapable of committing a rape. 1 Hale, 631. [This case has been overruled in Mass. 2 Pick. 380, where it has been held that a boy under 14 years may be indicted for an assault and battery, with intent to commit a rape.] Nor can a husband commit a rape upon his wife; but in both cases they may be principals in the second degree, and be punished for being present, aiding and abetting.—*Ibid*, 629.

If the woman yielded through fear of death or duress, it is rape. 1 Hawk. c. 41, S. C. And it is no excuse that she consented at first, if the offense were afterwards committed by force, and against her will; nor is it any excuse that she consented after the fact. *Ibid*, 5, 7. Even that the woman was a common strumpet or concubine of the ravisher, is no excuse, although this should certainly operate with the jury as to the probability of the fact, that connection was had with the woman against her consent.—1 Hale, 629.

The credibility of the party ravished, must be left with the jury. If she be of good character, presently discovered the offense, and made search for the offender; if the party accused fled, these and the like are concurring circumstances, which strengthen her evidence. But, if she be of evil fame, and stand unsupported by other testimony, —if she concealed the injury for any considerable length of time after she had opportunity to complain,—if the place where the offense was alleged to have been committed, were where it was possible she might have been heard, and she made no outcry—these and the like circumstances carry a strong, but not conclusive presumption, that her testimony is false. 4 Blacks. Com. 213. And the defendant may give evidence of her notoriously bad character for want of chastity and common decency, or that she had before been connected with the prisoner.—*R.* vs. *Hodgson*, 1 Phillip's Ev. 190; *R.* vs. *Clarke*, 2 Stark. 243.

Proof of the slightest penetration is sufficient; where a penetration was proved, but not of sufficient depth to injure the hymen, it was holden sufficient. —*R.* vs. *Russen*, 1 East. P. C. 438.

† For form of indictment, see ante, R. S. vol. 2, p. 358.

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other evidence, corroborating to the same extent as is required in cases of perjury as to the principal witness.

Burglary. SEC. 17. Every person who shall in the night time break and enter into a mansion house, store house, manufactory, office, shop, out-house or boat, with intent to commit a felony, shall be deemed guilty of burglary, and upon conviction thereof, shall be imprisoned in the State prison for not less than two, nor more than fourteen years, and be fined not exceeding one thousand dollars.*

Robbery. SEC. 18. Every person who shall, forcibly and feloniously,

*If the breaking and entering be in the night time, it is burglary; if in daylight, it is not. If it be committed during twilight, then, if there be not enough daylight left to discern a man's face, it is burglary; otherwise not. But this does not extend to moonlight.—3 Inst. 63; 1 Hale, 550; 1 Hawk, c. 38, sec. 2, 4; 4 Blacks. Com. 224.

The breaking and entering must both be in the night time. But the breaking may be on one night, and the entering on another. But the breaking must be with intent to enter. 1 Hale, 551. *Rex* vs. *Smith*, R. & R. 417.

A man cannot be convicted of burglary in his own house. If the owner of a house break and enter the room of his lodger, and steal his goods, it is no burglary, but larceny only. 2 East. P. C. 502, 506.

If a man have his doors or windows open, and another enter therein with intent to commit a felony, it is no burglary. Nor is it if he effects an entrance by taking the glass out of a door, or by pulling down the upper sash of a window which had no fastening, and was usually kept closed by the pully-weight only, even although an outer shutter, by which the window was usually secured, was not closed or fastened at the time. Opening an area gate with a skeleton key, and so descending the area steps, and entering the house by a door in the street, which was not shut, was not a breaking within the meaning of the statute, as there was no free passage in time of sleep from the area into the house. So if there be an aperture in a cellar window, to admit light, through which a thief enters, it is no burglary.—1 Hale, 552; R. & R. 417; 1 Leach, 252. *R.* vs. *Davis*, R. & R. 322. 2 Car. & P. 628; 3 Inst. 64.

An actual breaking is, where the offender, for the purpose of getting admission for any part of his body, or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in the wall of the house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting the latch, or unlooses any other fastening to doors or windows which the owner has provided.—3 Inst. 64, 1 Hale, 552.

A constructive breaking, is where the offender, with intent to commit a felony, obtains admisison by some artifice or trick. As, for instance, if a man knock at a door, and, upon its being opened, rush in, with a felonious intent, or, upon pretense of taking lodgings, fall upon the landlord and rob him, or procure a constable to gain admittance, in order to search for traitors, then bind him and rob the house; all these entries are within the statute. So where the defendant obtained admission, by promissing a boy, who was in care of the house, some ale, and whilst the boy was gone for the ale, robbed the house, this was holden to be burglary. If a servant conspire with a robber, and let him in the house, this is burglary in both. Getting down the chimney, is a sufficient breaking. If a thief gets into a house by the outer door or window being open, and afterwards breaks or unlocks an inner door, it is burglary.—4 Blacks. Com. 226; 1 Hawk. c. 38, sec. 9, 10; 2 East. P. C. 485; 1 Hale. 558.

An entry with any part of the body, or with any instrument held in the hand, is sufficient; as, after breaking open the door, to step over the threshold, to put a hand, or hook, or other instrument in at a window to draw out goods, or a pistol to demand one's money. It is even said that discharging a loaded gun in a house is a sufficient entry. But if a man assault a house, and even break a hole in it, and before entry, the owner fling his money to the thief, it is no burglary. So if the instrument with which the house is broken, happen to enter the house, but without any intention upon the part of the burglar, to effect his felonious intent, (as, for instance, to draw out the goods) with it, this is not a sufficient entry.—1 Hale, 555; Fost. 108; 3 Inst. 64; 1 Hawk. c. 3, sec. 11; 2 East. P. C. 487.

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take from the person of another any article of value by violence, or putting in fear, shall be deemed guilty of robbery, and upon conviction thereof shall be imprisoned in the State prison not less than two nor more than fourteen years, and be fined not exceeding one thousand dollars.*

Grand larceny.

SEC. 19. Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another, of the value of five dollars or upwards, shall be deemed guilty of grand larceny, and upon conviction thereof shall be fined not exceeding double the value of the goods stolen, be imprisoned in the State prison, not less than two nor more than fourteen years, and be disfranchised and rendered incapable of holding any office of trust or profit for any determinate period.†

* For form of indictment, see ante, R. S. vol. 2, p. 357.

Where a defendant tore a lady's ear through, in snatching an ear-ring from it, and where he tore some hair from a lady's head in snatching a diamond pin from it,—the pin having a cork-screw stalk to it, and being twisted very much in her hair,—these were held to be robberies. 1 Leach. 320, 335. So, if there be a struggle for the property, and it be wrested from the owner by superior force, it will be robbery. But merely snatching property from a person unawares, and running away with it, will not be robbery. 2 East. P. C. 709, 702. Fear cannot, in such case, be presumed. But snatching an article from a man's person, will constitute robbery, if it be so attached to his person, or clothes, as to offer resistance. —*R.* vs. *Mason*, R. & R. 417. If a man take another's child, and threaten to destroy it, unless the other give him money, it is robbery. 2 East. P. C. 735. Extorting money by threats, fear of a mob, and of a charge of crime, has been holden to be robbery. 2 East. P. C. 712, 714.

It is little matter under what pretence the robber obtains the money, if the prosecutor be forced to deliver it from actual fear, or under circumstances from which the court can presume it. As for instance, if a man, with a drawn sword, ask alms of me, and I give it him through mistrust and apprehension of violence, it is as much robbery as if he had demanded money in the ordinary way.—4 Blacks. Com. 242.

The value is immaterial. But the goods must be of some value to the person robbed; for, where the defendant compelled the prosecuting witness, by threats, to give her his promissory note for a sum of money, it was holden to be no robbery, because the note was of no value to the prosecutor.—2 Leach, 673.

If a thief put a man in fear and then in his presence drive away his cattle, it is robbery. So, if a man, being assaulted by a robber, throw his purse into a bush; or, flying from a robber, let fall his hat; and the robber in his presence take up the purse or hat and carry it away, this would be robbery.—1 Hale, 533.

It must appear that the robber got possession of the goods. If a robber cut a man's girdle in order to get his purse, and the purse thereby fall to the ground, and the robber run off or be apprehended before he can take it up; this would not be robbery, because the purse was never in the possession of the robber.—1 Hale, 583.

To seize a parcel carried on the head, to carry away a hat and wig without force, and to take an umbrella of a sudden out of another's hand, have been respectively holden to be mere larceny.—3 Chit. Cr. L., 804. 1 Leach, 290.

Where a man snatched at the sword of a gentleman hanging at his side, and the latter, perceiving the design, laid hold on the scabbard, on which a contest ensued, and the thief succeeded in wresting the sword from the owner, his offense was holden to be robbery.—*Id. ib.*

† The indictment charged the defendant with stealing several articles of personal property, and alleged their aggregate value to be 250 dollars, but did not specify the separate value of any one article. Plea, not guilty. Verdict of guilty, and judgment accordingly. Motion in arrest of judgment because the specific value of each article charged to have been stolen was not alleged in the

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indictment. *Held*, that the motion could not be sustained. The defendant was convicted of stealing all the things mentioned in the indictment: in such case, the statement of one value to all the articles stolen is sufficient. 5 Blackf. 224.

Indictment for larceny. Plea, not guilty. When the testimony was closed, the prisoner called upon the court to instruct the jury to find a verdict in his favor should they be of opinion that the offense proved amounted to a burglary. This instruction was refused. *Held*, that the refusal was not erroneous. *Wyatt* vs. *The State*, 1 Blackf. 257.

An indictment for larceny is not supported by evidence that the defendant has received or purchased the goods, knowing them to be stolen; although, by the statute, the punishment for the offense proved be the same with that charged. *Ross* vs. *The State*, 1 Blackf. 390.

Bees in the possession of the owner are the subject of larceny. *The State* vs. *Murphy*, 8 Blackf. 498.

If on an indictment for stealing several articles of a certain value, there be a verdict of guilty, the judgment should not be arrested, merely because the value of each article is not specified in the indictment. *The State* vs. *Murphy*, 8 Blackf. 498.

And though according to the value of the articles charged the offense be grand larceny, yet there may be a verdict for petit larceny.—*Ibid.*

An indictment charged that the defendant did feloniously *stal*, take and carry away one watch of the value of five dollars, &c. Plea, not guilty. Verdict: We find the defendant guilty of petit larceny, &c. *Held*, that the use of the word *stal* instead of *steal*, was not a sufficient cause to arrest the judgment; but that the verdict did not authorize the judgment, as the defendant might have been guilty of petit larceny, without being guilty of the larceny charged in the indictment.—*Wills* vs. *The State*, 4 Blackf. 457.

In an indictment for larceny, the jury have a right to determine the law as well as the facts of the case.—*Warren* vs. *The State*, 4 Blackf. 150.

If the record do not show but that the principal had been convicted before the trial of an accessory, there is no ground for the latter to object, in an appellate court, that there had been no such conviction.—*Harty* vs. *The State*, 3 Blackf. 386. See ante, R. S. vol. 2, p. 369, sec. 67.

Larceny at common law cannot be committed of such animals as are *feræ naturæ*, and unclaimed, such as deer, hares and conies, in a forest, chase or warren; fish in an open river or pond; or wild fowls at their natural liberty, or in forests though tame and saleable. (1 Hale, 511; Fost. 366; R. and R. 350.) But if they are reclaimed or confined, it is otherwise; for of deer so enclosed in a park that they may be taken at pleasure, fish in a trunk or net, and pheasants or partridges in a mew, larceny may be committed. (1 Hale, 511.) Animals which do not serve for food, (except those *domitæ naturæ*,) such as dogs and other creatures kept for whim or pleasure, cannot be the subject of larceny. —*Ibid.*

Larceny is defined correctly to be the taking and carrying away the goods of another, without any claim or pretense of right, with intent wholly to deprive the owner of them, and to appropriate them to his own use. Returning the goods can be considered merely as evidence of the defendant's intention when he took them; for if it appear that he took them originally with the intent of depriving the owner of them, and of appropriating them to his own use, his afterwards returning them will not purge the offense. (1 Hale, 533; East. P. C. 662.) Possession of stolen property recently after its loss is, unexplained, presumptive evidence that the party in possession stole it.—*R.* vs. *Stimpson*, 2 Carr. and P. 415.

If a man lose goods, and another find them, and, not knowing the owner, convert them to his own use, though he deny finding them, or secrete them, this is no larceny. (1 Hale, 506.) But it is otherwise if he know the owner; and therefore, when a bureau was given to a carpenter to repair, and he found money secreted in it, which he kept and converted to his own use, it was holden to be larceny.—2 Leach, 952.

A bare removal from the place in which the thief found the goods, though he does not make off with them, is a sufficient carrying away. (4 Blacks. Com. 231.) Where the prisoner lifted up a bag from the bottom of the boot of a coach, but was detected before he got it out, this was held to be sufficient carrying away. But otherwise, where the prisoner set a package on end, in the place where it lay, for the purpose of cutting open the side of it, to get out its

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contents, and was detected before he had accomplished his purpose; or when the thief was not able to carry away the goods, on account of their being attached by a string to the counter; or to carry off a purse, on account of some keys attached to the strings of it getting entangled in the owner's pocket.—1 Hale, 508.

The taking by the defendant an article delivered to him as a servant, to remove from one room to another, and converting the same to his own use, is larceny and not embezzlement. (4 Wash. C. C. R. 700.) Indictment for stealing bank notes. Three witnesses, persons of skill, testified to the genuineness and value of the bank note. It was proved that the prisoner passed the note in payment for certain goods and received the proper change. Held, that this was ample proof of the value and genuineness of the note; and sufficient *prima facie* evidence of the existence of the bank.—*Engleman* vs. *The State*, 2 Carter's Ind. Rep. 91.

The fact that stolen property is found upon the person of the defendant can always be given in evidence in a prosecution for the larceny against him; but the strength of the presumption which it raises against the accused depends upon all the circumstances surrounding the case.—*Ibid.*

Though there must be a taking from the actual or constructive possession of the owner, it is not necessary that it should be done by the hand of the party accused; for, if he procured an innocent agent, as a child or lunatic, to take the property; or if he obtained it from the sheriff by a writ of replevin without color of title, and with a felonious design, he will himself be the principal offender.—1 Hawk. P. C. chap. 38, sec. 8; 2 East. 555.

If a wife carry away and convert to her own use the goods of her husband, it is no larceny, for they are one person in law, and consequently there can be no taking so as to constitute larceny. (1 Hale, 514.) And the same, if others are jointly interested with the husband in the property taken; as if the wife of a member of a friendly society take money of the society deposited in a box in the husband's custody, this is no larceny. (Moody's C. C. 375.) But it is larceny for a man who elopes with another's wife to take his goods, though with the consent, and at the solicitation of the wife. (6 Cowen, 572.) And this is upon the ground that the wife, who has no legal property, can only be allowed to dispose of her husband's goods by his authority; and that under such circumstances no implied consent by the husband could be presumed to the taking by the wife.—Ry. and Moo. C. C. 243.

Under some circumstances, a man may be guilty of a larceny in taking his own goods, where the intent is to charge another with the value of them; as if he steals them from a pawnbroker or any one to whom he has delivered and entrusted them.—10 Wend. 165; 1 Russ. and Ry. C. C. 478.

Where the property of a person is in the possession of another, through inadvertence, and the latter, *animo furandi*, conceals it, he is guilty of larceny. Knowing it to be the property of another, his possession will not protect him from the charge of felony. (17 Wend. 460.) So wherever there is a mark upon property, by which the owner may be traced, and the finder, instead of restoring it, converts it to his own use, such conversion is larceny.—2 Russ. on Cr. 102.

Where the prisoner bought a horse, at the fair of the prosecutor, to whom he was known, and, having mounted the horse, said to the latter that he would return immediately and pay him, to which the prosecutor answered "very well," and the prisoner rode the horse away and never returned, it was held to be no larceny, because the property, as well as the possession, was parted with. (1 Leach, 467.) So where the prisoner sent to a hatter, in the name of one of his customers, for a hat, which was accordingly delivered to the messenger on the credit of the customer; it was held that this was not larceny, the owner having parted with his property in the hat. (Russ. & Ry. C. C. 225.) And for the same reason where a woman obtained from the prosecutor, in the name of one of his neighbors, half a guinea's worth of silver, saying that she would return presently with the half guinea, it was held not to be larceny. (2 East's P. C. 672.) So where the prisoner sent a letter to the prosecutor, in the name of another person, requesting a loan of money for a few days, and obtained the money accordingly, it was held to be no larceny, because it appeared that the property in the money was intended to pass by the delivery.—2 East's P. C. 672.

Where the prisoner, who was carter to the prosecutor, went away with, and disposed of, his master's cart, it was held larceny. (2 East's P. C. 565.) Where the servant of a master cartman employed to cart goods, by collusion with others, suffered the goods to be taken away, it was held larceny in the servant, and immaterial whether the property was laid in the bailee, or in the original owner. (Russ.

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& Ry. C. C. 125.) A servant who clandestinely takes his master's corn, though to give to his master's horses, is guilty of larceny. (Russ. & Ry. C. C. 307.) And where the prisoner was a porter to the prosecutor, and was sent by his master to deliver goods to a customer, and instead of doing so, sold them, this was held to be a larceny. (2 East's P. C. 566.) Where a master gave money to his servant to carry to another, and the servant applied it to his own use,—and where a master gave ten guineas to his servant to get silver for them, and instead of doing so, she ran away with the guineas—these were held larcenies. (2 Russ. on Cr. 201; 1 Leach, 302.) Even where a confidential clerk to a merchant, who had authority to get his master's bills discounted, and had the general management of his cash concerns, took a bill of exchange unindorsed, got it discounted, and absconded with the proceeds, it was held to be larceny.—2 Leach, 699; 1 *id.* 344; See 4 Taunt. 304; 2 Leach, 824-5; 2 East's P. C. 568; 2 Russ. on Cr. 197.

If the owner of goods deliver them to another, but be present all the time they are in the other's possession, and there be no intention on the part of the owner to relinquish his dominion over them by such delivery, the owner still retains the possession in law, notwithstanding the delivery; and if the person to whom he has so delivered them make away with them, and convert them to his own use, he will be guilty of larceny. (2 East's P. C. 633, 4; 1 Hawk. ch. 33, sec. 2.) As, if the owner give the goods to a man to carry, and accompany him at the same time, and the man run away with them, he is guilty of larceny. So, if a man have the bare use of another's goods, this does not divest the owner of the possession in law; and if such person fraudulently convert them, this is larceny. As, if a guest rob his inn or tavern of plate, it is larceny; for he has not the possession delivered to him, but merely the use. (1 Hale, 509; 1 Hawk. ch. 33, sec. 6.) But on the contrary, where goods of which the master has never been in possession, are delivered to the servant, for the master's use, and the servant, instead of delivering them to his master, by depositing them in his house, or the like, converts them to his own use, it is held to be no larceny at common law. (2 East's P. C. 568, 570; 2 Leach, 835, 841; 1 *idem* 28; Ry. & Moo. C. C. 129; Russ. & Ry. C. C. 215.) And this is, because the master never had possession, except by the hands of his servant.

If goods are delivered to a man upon trust, or taken by him with the owner's consent, the subsequent conversion of them is no larceny. (Arch. Cr. Pl. 186.) Thus, where the defendant saved some of the prosecutor's goods from fire, which happened in his house, and took them home to her own lodgings, but the next morning she concealed them, and denied having them in her possession, the jury finding that she took them originally merely from a desire of saving them for, and returning them to, the prosecutor, and that she had no evil intention until afterwards, the judges held that it was a mere breach of trust, and not a felony. (2 East's P. C. 694.) So, if a man take a letter, supposing it to belong to himself, and on finding it does not, appropriate to himself any property it contains, this does not amount to larceny, there being no *animus furandi* when he first received the letter. (Ry. & Moo. C. C. 160.) If A. lend B. a horse, and he ride away with him,—or if I send goods by a carrier, and he carry them away,—or if any other bailee convert the goods bailed to his own use, it is not larceny, because the original taking was *bona fide*, and without fraud. (1 Hale, 504; 1 Hawk. ch. 33, sec. 2.) And if A. in good faith hire a horse for a particular purpose, and after that purpose is accomplished, sell the horse, it is no larceny; for, unless he had originally a felonious intention, the subsequent withholding or disposing of the horse, does not constitute a new felonious taking.—Russ. & Ry. C. C. 441; 2 Russ. on Cr. 132.

Where the prisoner who was employed to drive sheep to a fair, drove them in a contrary direction, and sold ten of them, the same morning he received them, and the jury found that at the time he received them he intended to convert them to his own use; this was held to be larceny.—Ry. & Moo. C. C. 87.

The rule also applies only while the contract of bailment continues; for if that is at an end, and a conversion take place afterwards, it will amount to a larceny; (2 Russ. on Cr. 132; Crown Cir. Comp. 292,) as for instance, if a carrier take goods to the place appointed, and afterwards take them away and convert them, that will amount to larceny, (3 Inst. 107.) And the contract may be determined before its regular completion, by the tortious act of the bailee; as if a carrier open a bale or pack of goods, or pierce a vessel of wine and take away part of the contents, he is guilty of larceny, (Id. ib. 1 Hale, 105.) So, if a miller having received an article to grind, fraudulently separate a part of it from the rest, for his own use, the bailment is thereby determined, and the con-

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version to his own use of the part separated is larceny, (1 Pick. 375.) Where forty sacks of wheat were sent for safe custody to a warehouse-man, who emptied several of the sacks, sold the wheat and substituted other wheat of an inferior quality; it was held, that the taking of the whole of the wheat out of one sack was as much a larceny as the taking of a part merely.—Russ. & Ry. C. C. 337.

Where a man with a felonious intention, (*animus furandi*) obtains in pursuance thereof the possession of goods by some trick or artifice, such a taking amounts to larceny, although there be a delivery in fact. Thus, where the prisoner offered to give the prosecutor gold for bank notes, and upon the prosecutor laying down some bank notes, for that purpose, the prisoner took them up and went away with them, promising to return immediately with the gold, but in fact never returned, it was held that if the jury should find that the prisoner had the *animus furandi* at the time he took the notes, the case amounted to larceny.—4 Taunt. 274.

Where the prisoner persuaded a tradesman to take goods to a particular place, under the pretense that they would there be paid for; and afterwards induced him to leave the goods in the care of a third person, from whom the prisoner got the goods without paying for them; and the tradesman swore that he did not intend to part with the goods until they were paid for; and the jury found that the defendant, from the beginning, intended to get the goods without paying for them—this was held larceny.—Ry. & Moo. C. C. 179. So where the prisoner having bargained for goods, which by the custom of trade should have been paid for before they were taken, took them away without the consent of the owner, and at the time he bargained for them did not intend to pay for them, but meant to get them into his own possession and dispose of them for his own benefit; this was held to be larceny, (Ry. & Moo. C. C. 185.) So where the prisoner, intending, from the beginning, to obtain goods by fraud, had them put into his cart upon the express condition that they should be paid for before they were taken out of the cart, and then took them out of the cart without paying for them and converted them to his own use; this was held to be larceny. (Idem, 250.) Where a hosier, by the prisoner's desire took a parcel of silk stockings to his lodgings, out of which the prisoner chose six pairs, which he laid on the back of a chair, and then sent the prosecutor back to his shop for some other articles, and during his absence absconded with the stockings; it was held this amounted to larceny—the prisoner having clearly obtained possession of the goods *animo furandi*. (1 Leach, 93; 2 East's P. C. 675.) And where the prisoner hired a horse of the prosecutor, on pretense of going a journey, but instead of doing so, sold the horse the same day in Smithfield market; it was left to the jury to say whether he hired the horse for the purpose of stealing it, or for the purpose of going the journey, and afterwards changed his mind. The jury being of the former opinion found him guilty, and seven of the judges afterwards held that the offense was felony, (1 Leach, 212; 2 East, 685.) So, where the prisoner hired the horse in the name of another person. (1 Leach, 409; 2 East, 689.) So, where the prisoner hired a post-chaise with intent to convert it to his own use, and never returned it; upon being indicted for it twelve months afterwards, as for a larceny, it was held to amount to that offense, although the chaise was not hired for any definite time. (2 East, 691. 1 Leach, 420.)

If a man, *animo furandi*, sue out a writ of replevin, and by means thereof obtain possession of another man's horse, and ride away with it; or if by a fraudulent ejectment he get possession of another man's house, and carry away the goods out of it, he is guilty of larceny. (1 Hale, 507; 1 Hawk. ch. 33, sec. 12; 3 Inst. 108; 2 Leach, 1066, n) Where the prisoner, *animo furandi*, obtained goods from the servant of a carrier, by falsely pretending to be the person to whom the goods were directed, it was held to be larceny; because the servant had no authority to part with the goods to any but the right person, (Ry. & Moo. C. C. 137.) Where the prisoner, by artifice, obtained possession of a request note at the India House, by means of which he obtained a permit for a chest of tea belonging to the prosecutor, to whom he was a perfect stranger, and the chest of tea was thereupon delivered to him, this was held to be larceny, notwithstanding the possession had been obtained by means of a regular request note and permit, (Russ. & Ry. C. C. 163.) A hosier having sent his apprentice with a parcel of stockings to a Mr. Heath's, the prisoner met him and asked him where he was going. The apprentice answered, "to Mr. Heath's;" the prisoner replied that he was the person, desired the apprentice to give him the parcel, and gave him a small parcel in return to take home to his master. The apprentice accordingly gave the priso-

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Petit larceny.

SEC. 20. Every person who shall feloniously steal, take and carry, lead or drive away the personal goods of another, of the value of any sum less than five dollars shall be deemed guilty of petit larceny, and, upon conviction thereof, shall be fined not exceeding five hundred dollars, be imprisoned in

ner the parcel, but the parcel he took for his master contained nothing but old rags of no value; the judges held this to be larceny.—1 Leach, 250.

Obtaining money or goods by the practice of "ring dropping," as it is termed, has also been held to be larceny. Thus, where the prisoner, in the presence of the prosecutor, picked up a purse in the street containing a receipt for £147, for "a rich, brilliant diamond ring," and also the ring itself; it was then proposed that the ring should be given to the prosecutor, upon his depositing his watch and some money, as a security that he would return the ring as soon as his proportion of the value should be paid to him by the prisoner; the prosecutor accordingly deposited his watch and money, which were taken away by some of the prisoner's confederates; but the ring turned out to be of the value of 10s. only, and the watch and money were never returned. It was left to the jury to say whether this was not an artful, preconcerted scheme to get possession of the prosecutor's watch and money; and the jury being of that opinion, convicted the prisoner. (1 Leach, 238, 314; 2 East's P. C. 679, 680; 2 Leach, 640.) Where the prisoner decoyed the prosecutor into a public house, and there introduced the play of "cutting," and one of them prevailed upon the prosecutor, who did not play on his own account, to cut the cards for him, and then, under the pretense that the prosecutor had cut the cards for himself, and lost, another of them swept his money off the table, and went away with it, it was considered a case which should be left to the jury whether the money was obtained upon a preconcerted scheme to steal it; if so, it would be larceny. (1 Leach, 270; Cald. 295.) So, where the prosecutor was induced by a preconcerted plan to deposit money upon a bet, and the stake-holder afterwards, upon a pretense that one of his confederates had won the wager, handed the money over to him, and the jury found that at the time the money was taken, there was a plan to keep it, under the false color of winning the bet, this was held a larceny; for the prosecutor parted with the possession only, and not the property, which was to pass eventually only in case he really lost the wager.—Russ. & Ry. C. C. 413.

Where the prisoner drew a pocket-book from the inside pocket of the prosecutor's coat, about an inch above the top of the pocket; but while the book was still about the person of the prosecutor, he suddenly raised his hand, upon which the prisoner let the book drop, and it fell into the prosecutor's pocket; this was considered a sufficient carrying away to constitute simple larceny.—Ry. & Moo. C. C. 78.

The felonious quality consists in the *intention* of the prisoner to defraud the owner, and to apply the thing stolen to his own use. (3 Chit. Cr. L. 926; 2 Stark. Ev. 827.) But to make a taking felonious, it is not necessary that it should be done *lucri causa*, for the sake of gain. A taking with intent to destroy, or otherwise deprive the owner of the goods, will be sufficient, if done to serve the offender, or any other person, though not in a pecuniary way. Russ. & Ry. C. C. 292, 307, 118.

Taking a horse from a common, and after riding it a considerable distance, returning it there again, is but a trespass. So, where a man takes another's harrow or plough, and after plowing his own land, returns it to the place whence he took it, or tells the owner of his using it, this may be a trespass, but is not a felony, (1 Hale, 509,) because the returning of the thing sufficiently evinces that the party, when he took it, had no felonious intention. Returning the goods, however, can be considered merely as an evidence of the defendant's intentions when he took them; for if it appear that he took them originally with the intent of depriving the owner of them, and of converting them to his own use, his afterwards returning them, will not purge the offense. (1 Hawk. ch. 34, sec. 2; 1 Hale, 533; 2 East's P. C. 557; 2 Russ. on Cr. 96.) And where the prisoners entered another man's stable, at night, and took out his horses and rode them thirty-two miles, and left them at an inn, and were afterwards found pursuing their journey on foot, they were held to have committed only a trespass. (2 East's P. C. 661-2.) But in these cases, if the party had sold the article taken, this would be declarative of the first taking being felonious. (Id. ib.)

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the State's prison not less than one nor more than three years, and disfranchised, and rendered incapable of holding any office of trust or profit, for any determinate period, or fined and disfranchised, and rendered incapable of holding any office of trust or profit, and imprisoned in the jail of the proper county for any determinate period of time, not exceeding one year.

Second conviction of petit larceny.

SEC. 21. Any person shall, on a second conviction of petit larceny, suffer the punishment presecribed for those convicted of grand larceny.

Receiving stolen goods.

SEC. 22. Every person who shall buy, receive, conceal or aid in the concealment of any stolen property, knowing the same to have been stolen, shall, upon conviction thereof, suffer the punishment prescribed in case of larceny. *

Proof of thief's conviction not necessary.

SEC. 23. In any prosecution for the offense of buying, receiving, concealing or aiding in the concealing of any stolen property, it shall not be necessary on the trial thereof to prove that the person who stole such property has been convicted.

Bonds, promissory notes, &c., subjects of larceny.

SEC. 24. Bonds, promissory notes, bank notes, treasury notes issued by the authority of the State of Indiana, canal scrip, bills of exchange, or other bills, orders, drafts, checks, or certificates, for or concerning money or property due, or to become due, or to be delivered, any deed or writing containing a conveyance of land, or any valuable contract in force, or any receipt, release or defeasance, or any other written instrument whatever, shall be considered as personal goods, of which larceny may be committed.

Altering mark of cattle.

SEC. 25. Every person who shall alter the mark or brands of the horse, mare, gelding, ass, mule, sheep, goat, neat cattle, or hog of another, or mark or brand any such animal with intent to steal the same, if the value of the animal so marked be five dollars or upwards, shall be subject to the punishment inflicted on those guilty of grand larceny, and if the value of such animal be less than five dollars, such person shall be subject to the punishment inflicted on those guilty of petit larceny.†

Falsely personating, &c.

SEC. 26. Every person who shall falsely personate or represent another, and in such assumed character shall re-

* The indictment contained two counts, one against *B.* for stealing, the other against *A.* for receiving the goods, knowing them to be stolen. *Held*, that the second count was not objectionable for not stating the time, place, value of the goods, &c., these requisites being laid in the first count and referred to in the second. *Held*, also, that there was no misjoinder. *Redman* vs. *The State*, 1 Blackf. 429.

Indictment for receiving stolen goods, knowing them to be stolen. *Held*, that the time and place when and where the goods were stolen, need not be stated in the indictment, nor proved at the trial. *Holford* vs. *The State*, 2 Blackf. 103.

The receiving of stolen goods is a crime independent of the stealing, and is subject to punishment without reference to the trial or conviction of the thief. *Redman* vs. *The State*, 1 Blackf. 429.

† For form of indictment, see ante, R. S. vol. 2, p. 358.

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ceive any property intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed guilty of larceny, and shall suffer the punishment inflicted on those guilty of grand or petit larceny, according to the value of the property so received.

Obtaining goods by false pretenses.

SEC. 27. If any person, with intent to defraud another, shall designedly, by color of any false token or writing, or any false pretense, obtain the signature of any person to any written instrument, or obtain from any person any money, transfer, note, bond or receipt, or thing of value; such person shall, upon conviction thereof, be imprisoned in the State's prison not less than two nor more than seven years, and fined not exceeding double the value of the property so obtained.*

* On an indictment for obtaining by *false pretense* the signature of a party to a note, where the pretense was, that the prisoner had money in the hands of a third person, absent at the time, it was *held*, that it was not material to prove the amount represented to be the identical sum stated in the indictment; that it was enough if it was sufficient to meet the payment of the note which the party was induced to sign. *The People* v. *Herrick*, 13 Wendell's New York Rep. 87.

It is competent to a party whose signature has been fraudulently obtained, to state the reasons why he did not confide in the *personal responsibility* of the accused. Ibid.

If the accused attempt to show his *ability* to pay, the proof must be limited to the *time* when the signature was obtained. Ibid.

A *false representation* authorizes the inference of an intent to defraud. Ibid.

It is not necessary to a conviction, that the false pretenses should be the *sole inducement* to the signing of the note; if they have a controlling influence in inducing the signature, it is enough, although minor considerations operate on the mind of the party. Ibid. And see *The People* vs. *Haynes*, 11 Wendell 557.

Where a signature to a note has been obtained by false pretenses, and the party defrauded has been obliged to pay the note, the indictment may charge the *sum paid* to have been obtained by false pretenses, without setting forth the obtaining of the signature. 13 Wendell 87.

Proof that a party from whom a note has been obtained by false pretenses, has been subjected to the payment of the money specified in the note, is inadmissible unless there be a count for obtaining money by false pretenses. *The People* vs. *Gates*, 13 Wendell 311.

In an indictment under the statute for obtaining by false pretenses the signature of a person to a written instrument, it is not necessary to charge loss or prejudice to have been sustained by the prosecutor; the offense is complete when the signature is obtained by false pretenses, with intent to cheat or defraud; and it is not essential that actual loss or injury should be sustained. *The People* vs. *Gennung*, 11 Wendell 18.

A writing in the form of a bond, neither having the signature nor purporting to have the signature of any person attached to it, is not a false writing within the meaning of the statute. To constitute it such, it must be some instrument, letter, or other writing false in fact, but purporting to have been signed by some person, and to be his act, and so framed as to have more weight and influence in effecting the fraud of obtaining a signature to a written instrument, or goods, etc., than the mere naked assertion of the party defrauding. *The People* vs. *Gates*, 13 Wendell, 311.

The statute against obtaining goods by false pretenses extends to every case where a party has obtained money or goods by falsely representing himself to be in a situation in which he is not, or by falsely representing any occurrence that has not happened, and to which representations, persons of ordinary caution may give credit. *The People* vs. *Haynes*, 11 Wendell 557.

An indictment lies for obtaining goods by false pretenses, where a party represents himself to be the owner of property which does not belong to him, and thus fraudulently induces the owner to sell goods to him on a credit. The gist

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Crime and punishment—felonies—arson.

SEC. 28. Every person who shall wilfully and maliciously set fire to the dwelling house, barn, stable, boat, water-craft, mill, mill house, distillery, manufactory, mechanic's or artificer's shop, store house building or room, occupied as a shop or office for professional business, or printing office of another, or any public bridge, court house, jail, market house, church or meeting house, school house, seminary or college edifice, or building thereto belonging, or other public building, or to any cord wood in piles or ricks, or stacks or shocks of grain or hay, or any fence or growing grain, of the value of twenty dollars; or to any house, shop, wood house, water station or other building connected with any rail road; or shall

Arson.

of the offense in such case, consists in procuring the goods of another by false pretenses, with the intent to cheat and defraud; intentionally and fraudulently inducing the owner to part with his property, by wilful falsehoods, in representing himself to be in a condition in which he knew he was not. *The People* vs. *Kendall*, 25 Wendell 399.—14 Wendell 558.—11 Wendell 565.

An indictment charged that the defendant falsely pretended to one A., that B., C. and D. were indebted to him, the defendant, in a certain sum, and that they were bound to pay a certain bill of exchange, then in the defendant's possession and then over due, drawn by the defendants B., C. and D., payable to their order ninety days after date, and accepted by them, and which they indorsed to the defendant who indorsed it to said A.; that by said false pretenses, the defendant obtained from said A. certain goods with intent to cheat, &c.; whereas, in fact, the said B. and C. were not then indebted to the defendant, nor were said B., C. and D. bound to pay said bill. Held, that the first pretense was not sufficiently negatived, and, as to the second, that there should have been an averment that the defendant knew that B., C. and D. were not bound to pay the bill. An indictment for obtaining goods by false pretenses must state to whom the goods belonged. *The State* vs. *Smith*, 8 Blackf. 489.

It is not necessary to prove all the pretenses charged; proof of part, and that the money was obtained by such part, is sufficient. Russ. & R. C. C. 190.

As to the time when the false reprsentations are made, it has been decided in a late case by the court of errors, that if the false pretenses are not made until after the goods are actually delivered, and the sale is complete, the person cannot be convicted of obtaining the goods by false pretenses.—14 Wend. 546.

An indictment will not lie for obtaining money by false pretenses, where the money is parted with as a charitable donation, although the pretenses moving to the gift are false and fraudulent.—17 *Idem*, 351.

It is not necessary that the false pretense should be in words. Thus, if a person obtain goods from another, and give, in payment, a check upon a banker with whom he has no cash and keeps no account, it is a false pretense within the meaning of the act.—3 Camp. Rep. 370; 7 Car. and P. 825, 784; 14 Wend. 559.

But the pretense must be of some existing fact, made for the purpose of inducing the prosecutor to part with his property. Therefore, a pretense that the party would do an act he did not mean to do, as a pretense to pay for goods on delivering, is not a false pretense within the act, but merely a promise for future conduct. (Russ. and Ry. C. C. 461.) The pretense must be for the purpose only of obtaining the property. Therefore, a pretense to a parish officer, as an excuse for not working, that the party has not clothes, when he really has, though it induce the officer to give him clothes, is not a false pretense within the statute; the statement being rather a false excuse for not working, than a false pretense to obtain goods. (*Idem*, 504.) If a person procuring a tradesman to sell him goods as for ready money, direct him to send them to his lodgings, and then deliver fabricated bills in payment, retaining the goods, he may be convicted of having obtained them by false pretenses.—2 Leach, 614.

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in like manner set fire to any bridge, or any part of the structure of any rail road, shall be deemed guilty of arson, and, upon conviction, be fined not exceeding double the value of the property destroyed, and be imprisoned in the State's prison not less than two nor more than ten years; and should the life of any person be lost thereby, such offender shall be deemed guilty of murder, and suffer death, or imprisonment in the State prison during life.*

Placing obstructions on railroad.

SEC. 29. If any person shall wilfully and maliciously place any obstructions upon the track of any railroad, or change any switch, or remove the fastenings thereof, so as to endanger the passage of trains, or break, destroy, steal, take or carry away any lock or guard upon such switch, or wilfully commit any other act to throw the engine or cars running upon such railroad from such track, he shall be imprisoned in the State prison not less than one, nor more than seven years; and if, from any accident on any such road, resulting from any such act, any person be so injured that death ensue as the immediate consequence thereof; the person so offending, shall be deemed guilty of murder in the second degree, and upon conviction shall be imprisoned in the State prison during life.

Forgery.

SEC. 30. Every person who shall falsely make or assist to make, deface, destroy, alter, forge or counterfeit, or cause to be falsely made, defaced, destroyed, altered, forged or counterfeited, any record, deed, will, codicil, bond, writing obligatory, bill of exchange, promissory note for the payment of money or property, bank note, post note, receipt for money or property, power of attorney, certificate of a justice of the peace, or other public officer, auditor's warrant, treasury note, county order, acceptance or indorsement of any

* For form of indictment, see ante, R. S. vol. 2, p. 357.

An indictment for arson should allege the value of the property destroyed. It should also allege that the property burned or set fire to belonged to the person in actual possession in his own right. *Ritchey vs. The State*, 7 Blackf. 168.

THERE MUST BE AN ACTUAL SETTING FIRE TO OR BURNING.—But it is not necessary that the entire building should be set on fire, or that any part of it should be entirely consumed; for if once a part of it is on fire, though it should go out without any effort to extinguish it, the crime will be complete.—3 Inst. 66; 2 Chit. Cr. L. 1104.

IT MUST BE WILFUL AND MALICIOUS.—The accidental burning, therefore, of a dwelling house, though it occur in doing an unlawful act, is not arson. But malice, in this case, does not merely imply a design to injure the party who is ultimately the sufferer, but an evil and mischievous intention, however general. For if a man has a design to burn one house, and by accident the flames destroy another, in which there shall be, at the time, some human being, he will be guilty of a malicious burning of the latter.—1 Hale, 569.

In general, if the act be proved to have been done wilfully, it may be inferred that it was done maliciously, unless the contrary be proved.—Russ. and Ry. C. C. 207.

The offense may be committed by a landlord's wilfully setting fire to his own house, of which another is in possession under a lease from himself, or from those whose estate he hath; for, during the lease, the house is the property of the tenant.—4 Blacks. Com. 222; Fost. 115.

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bill of exchange, promissory note, draft, or order, or assignment of any bond, writing obligatory or promissory note for money or property, or any order, or draft, for the payment of money, or property; or any other instrument in writing, or any lawful brand on a tobacco, beef, bacon, or pork cask, lard keg or barrel, salt barrel or hay bale, or any person who shall utter, or publish as true, any such instrument, knowing the same to be false, defaced, altered, forged, or counterfeited, with intent to defraud any person, body politic or corporate, shall be deemed guilty of forgery.*

*As to number of witnesses required to prove the genuineness of a bank note, &c., see ante, R. S. vol. 2, p. 372.

It is the general rule, that in indictments for forgery, the instrument must be set out. There are, however, some exceptions to this rule; as when the forged instrument has been destroyed by the prisoner, or has remained in his possession, or cannot be produced, and there has been no laches on the part of the prosecution. See *The Commonwealth* vs. *Houghton*, 8 Mass. R. 107; 2 Cowen, 522.

To constitute the offense of forgery in counterfeiting the notes of a bank, it is not necessary that such bank as the notes purport to have been issued by should have a legal existence. When, however, the intent is charged to have been to defraud the bank purporting to have issued the notes, the bank must be shown to be a real body, capable of being defrauded.—*The People* vs. *Peabody*, 25 Wendell, 472.

A statute enacted "that every person who shall falsely make, deface, destroy, &c. any record, &c. shall be deemed guilty of forgery." Held, that an indictment on that statute, charging that the defendant did unlawfully and feloniously destroy, &c. was not objectionable for omitting the word "falsely."—*The State* vs. *Dark*, 8 Blackf. 526.

An indictment against a person for passing a counterfeit bank note, must set out a copy of it.—*The State* vs. *Atkins*, 5 Blackf. 458.

The slightest alteration of a genuine instrument, in a material part, whereby a new operation is given to it, is forgery.—2 East. P. C. 986, 979.

Whether the name forged be that of a fictitious person, or a person actually existing, is immaterial.—2 East. P. C. 958.

If several combine to forge an instrument, and each execute by himself a distinct part of the forgery, and they are not together when the instrument is completed, they are, nevertheless, all guilty as principals.—*R.* vs. *Bingley et al.*, R. and R. 446.

That the signature, or other part of the instrument alleged to be forged is not of the handwriting of the party, may be proved by any person acquainted with his handwriting, either by having seen him write, or by being in the habit of corresponding with him.—2 Starkie, 164.

It has been decided that it is forgery to fabricate a will by counterfeiting the name of a pretended testator who is still living. (Leach's C. C. 355; 2 East's P. C. 948.) And signing a wrong christian name of the person whose will a false instrument purports to be, is a forgery. (1 Leach's C. C. 20.) But if it appear that the will purports to be a will of land, and is attested by two witnesses only, three being necessary to the validity of a will of real estate, it is not a forgery. *Idem*, 953; 1 Bay's Rep. 207, 209.

Not only the fabricating and false making of the whole written instrument, but a fraudulent insertion, alteration or erasure, even of a letter, in any material part of a true instrument, whereby a new operation is given to it, will amount to forgery; and this, although the instrument be afterwards executed by another person innocent of the deceit. (2 East. 855; 2 Russ. on Cr. 318.) And the fraudulent application of a true signature to a false instrument, for which it was not intended, or, *vice versa*, will also be a forgery. (2 East's P. C. 855.) Thus, it is forgery in a man who is ordered to draw a will for a sick person, to insert legacies in it without being directed to do so. (2 Russ. 318.) Or, if finding another's name at the bottom of a letter, at a considerable distance from the other writing, he cause the letter to be cut off, and a general release to be written above the name,

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and then take off the seal and fix it under the release. (2 Russ. 318.) So the alteration of a date of a bill of exchange, after acceptance, by which its payment may be accelerated,—altering a bill from a lower to a higher sum,—altering the place of payment,—expunging an indorsement on a bank note with a liquor, are forgeries. (3 Chit. Cr. L. 1037–8.) But it seems that a man cannot be guilty of forgery by a mere *non-feasance;* as if, in drawing a will, he should omit a legacy which he was directed to insert; but it appears to have been holden that if the omission of a bequest to one man cause a material alteration in the limitation of a bequest to another, as where the omission of a devise of an estate for life to one man causes a devise of the same lands to another, to pass a present estate, which otherwise would have passed a remainder only, the person making such an omission is guilty of forgery.—2 Russ. on Cr. 320.

The intent is mostly evidenced by the act itself, which, from its nature, leaves, in general, no room for doubt upon the point. The inference is frequently confirmed by the conduct and behavior of the guilty party in the artifices and falsehoods which he employs for the purpose of effecting his object, or of avoiding detection. The subsequent uttering of the forged instrument is admissible and strong evidence to prove the original design of forging the instrument.—Roscoe's Cr. Ev. 400.

In order to find the intent to defraud a particular person, it is not necessary there should be evidence to show that the prisoner had that particular person in contemplation at the time of the forgery. It is sufficient if the forgery would have the effect of defrauding him; for the prisoner, in contemplation of law, intends that which is the natural consequence of his acts. Thus, uttering a forged stock receipt, to a person who employed the prisoner to buy stock to that amount, and advanced the money, is sufficient evidence of an intent to defraud that person.—Russ. & Ry. C. C. 169; 4 Wash. C. C. R. 726.

It may be collected from a number of cases, that forgery in the name of a person who has no real existence, is as much criminal as if there was an intent to defraud an individual whose name is counterfeited. Thus, the making of a bill of exchange is within the rule, although all the names to it are fictitious. (3 Chit. Cr. L. 1035; 1 Leach's C. C. 83, 172, 257 and note (*a*); 7 Peters' Rep. 132; 2 Mass. Rep. 77.

Mr. Chitty states the rule to be, that it is of no consequence whether the counterfeited instrument be such as, if real, would be effectual to the purpose it intends, so long as there is a *sufficient resemblance* to impose on those to whom it is uttered.—3 Chit. Cr. L. 1035.

Thus, it has been decided, in England, that the making of a false instrument is forgery, though it may be directed by statute that instruments of that nature shall be in a certain form, which, in the forged instrument, may not have been complied with; the statute not making the informal instrument absolutely void, but it being available for some purposes. (Roscoe's Cr. Ev. 291; Russ. & Ry. C. C. 255.) Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law.—Id. ib.; 1 Leach, C. C. 257.

But it has been decided in Pennsylvania, that forging an instrument which on the face of the indictment appears to be void, if it were genuine, is not an indictable offense; as, for instance, a writing purporting to contain a mere naked promise to pay a sum in labor, expressing no consideration, and being connected with no consideration, by averment in the indictment.—9 Cowen, 778. 12 Serg. & Rawle, 237. Addis. Rep. 33.

The instrument counterfeited must bear a resemblance to that for which it is put forth, but need not be perfect or complete. It is sufficient if it is calculated to impose on mankind in general, though an individual skilled in writings of that kind should detect its falsity. (3 Chit. Cr. L. 1038. 2 East's P. C. 858.) The same rule holds in cases of counterfeiting the seals, and coining. (Id. ib.) And it has been holden that a bank note may be counterfeited, though the paper contains no water mark, and though the word *pounds* is omitted; that word being supplied by figures in the margin; for it was said that in forgery there need not be an exact resemblance, but it is sufficient if the counterfeit be *prima facie* fitted to pass for the writing which it represents. Neither will a mistake in the christian name of the party in making the false signature to the instrument, prevent the case from amounting to forgery; as where the prisoner was indicted for forging the will of Peter Perry, and the will began, "I, Peter Perry," and was signed "John Perry." (1 Leach's C. C. 175, 9. 2 East. 953.) Nor will it make

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any difference that the name forged is not rightly spelled; (3 Rogers' Crim. Rec. 142.) or that the hand writing does not resemble his whose name is forged. 6 Idem 61.

Delivering a box containing, among other things, forged stamps, to the party's own servant, to be forwarded by a carrier to a customer in the country, is an uttering. 3 Chit. Cr. L. 1038, 9. Russ. & Ry. C. C. 212. 4 Taunt. 300.

But pledging a counterfeit note which has to be redeemed at a future day, is not a passing or uttering. 3 Yerg. Rep. 451.

Giving a forged note to another person, however, whether an accomplice or not, in order that he may pass it, is an uttering and publishing. Ry. & Moo. C. C. 166. 11 Mass. Rep. 136.

The mere fact of uttering a counterfeit note as a genuine note, is tantamount to a representation that it is so. Russ. & Ry. C. C. 127. The mere showing a man an instrument the uttering of which would be criminal, though with an intent of raising a false idea in him of the party's substance, is not an uttering. Nor will the leaving it afterwards sealed up, with the person to whom it was shown, under cover, that he may take charge of it as being too valuable to be carried about, be an uttering or publishing. Idem, 200.

The crime of uttering and publishing is not complete, however, until the paper is transferred, and comes to the hands or possession of some person other than the felon, his agent or servant. Thus, where a note with forged indorsements is sent by the felon by mail from one county to an individual in another county for the purpose of obtaining credit upon it, the crime is not consummated until the note is received by the person to whom it was sent. 21 Wend. 509.

The making or indorsing a bill of exchange, all the names to which are fictitious, is a forgery. (2 East's P. C. 957; 1 Leach, 172, 257, note (*a*); 3 Chit. Cr. L. 1035, note (*B*.) Nor is it necessary that any additional credit should be obtained by using the fictitious name. For where the prisoner indorsed a bill, he had found, in a feigned name, to conceal that it had passed through his hands, he was holden guilty of forgery, though he might have procured the money, on discounting it, by a true indorsement of his own.—1 Leach, 172; Russ. & Ry. C. C. 75, 90, 209, 278.

So to put a fictitious name on a bill indorsed in blank, in order to circulate it with secrecy, is a similar offense.—*Idem*, 215.

But to support a charge of forgery by subscribing a fictitious name, there must be satisfactory evidence on the part of the prosecutor that it is not the party's real name, and that it was assumed for the purpose of fraud in that instance.—Russ. & Ry. C. C. 260.

It is well settled that a man may be guilty of forgery by the fraudulent making of an instrument, though in his own name, if he represents it as the act of another person of the same name. (Hawk. P. C. C. 1, ch. 70, sec. 2.) As, if a bill of exchange payable to A. B. or order came to the hands of a person named A. B. (but not the payee,) who fraudulently indorses it for the purpose of obtaining the money. (4 T. R. 28.) And where coal consigned to G. P., of New York, arrived and was claimed by another of the name of G. P., who resided there, and he knowing this, obtained an advance of money on indorsing a permit for the delivery of the coal, with his own proper name. This was held forgery.—6 Cowen, 72.

Where a wife, with her husband's knowledge, and by his procurement, but in his absence, uttered a forged paper, it was held that the presumption of coercion on the part of the husband did not arise; that she might be indicted as principal, and her husband as accessory before the fact.—Russ. & Ry. C. C. 270; 2 Leach's C. C. 1096.

Where the prisoner is charged with uttering or putting off a forged instrument, knowing it to be forged, evidence of that guilty knowledge must be given on the part of the prosecution; and for that purpose the uttering or having possession of similar forgeries will be admissible. (Roscoe's Cr. Ev. 409.) And for the same purpose, evidence that other notes of the same fabrication had been found on the files of the bank with the prisoner's name on the back of them, is admissible.—Russ. & Ry. C. C. 132, 120; 1 Camp. 324; S. C. 3 Chit. Cr. L. 1039, note (*B*)

So evidence of a prisoner's false declarations relating to a forged bank note uttered by him, (5 Day's Rep. 175,) or of a prisoner's endeavors to engage a person to procure for him counterfeit money,—of his declared intention to become acquainted with a counterfeiter, and to remove to a place near to his residence, is proper as going to show a guilty knowledge. (5 Rand. Rep. 701.)

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Crime and punishment—felonies--counterfeiting.

Counterfeiting coin.

SEC. 31. Every person who shall forge or counterfeit any gold or silver coin which shall be at the time current in this State, or utter or tender in payment, any such forged or counterfeit coin, or any forged or counterfeit bank note, bill, or treasury note, knowing the same to be forged, or counterfeit, with intent to defraud any person, shall be deemed guilty of forgery.*

Giving, &c, counterfeit coin &c,

SEC. 32. Any person who shall with intent to defraud any person, give, barter, sell or put away, forged or counterfeit gold or silver coin, which shall be at the time current in this State, or any bank note, or any draft or certificate of deposit, drawn on or by any bank of any State, knowing the same to be forged, or counterfeit, shall be deemed guilty of forgery.

Giving, &c., with intent to put in circulation.

SEC. 33. Every person who shall give, barter, sell, utter, publish or put away, any forged or counterfeit gold or silver coin, which shall be at the time current or in circulation in this State, or any false, forged or counterfeit bank note, bill, or draft, or certificate of deposit drawn on or by any bank of any State, with intent to have the same put in circulation, knowing the same to be forged or counterfeit, shall be deemed guilty of forgery.

*For form of indictment, see ante, R. S. vol. 2, p. 357.

On an indictment for counterfeiting money, possession of instruments for coining is admissible.—2 Const. Rep. 776.

The possession also of other forged notes by the prisoner, is evidence of his guilty knowledge. (Russ. & Ry. C. C. 121.) In order, however, to render such evidence admissible, it must be proved in the regular manner that the other notes were forged.—*Idem*, 245, Millard's case.

It must be proved both that the coin is counterfeit, and that it resembles, or is apparently intended to resemble, the legal coin. The fact that the coin counterfeited or resembled is such as is current by custom or usage within this State, may be proved by common usage or reputation.—Roscoe's Crim. Ev. 296; 1 Hale, 213.

In proving the coin to be counterfeit, two questions may arise: first, whether it is in such a state of completeness as to be properly described as a false and counterfeit *coin*; and secondly, whether it does resemble, or is apparently intended to resemble, the current coin. With regard to the first question, it is said there must be a substantial making or counterfeiting proved; that it will not be sufficient merely to show that steps have been taken towards a counterfeiting. Though the coin be unskillfully executed, still the offense is complete, if such coin be so far finished, and in such a state, that it is calculated to deceive; and whether it is so or not, is a question of fact for the jury.—6 Rogers' Cr. Rec. 63.

The guilty knowledge and intent to utter, can, in general, only be proved by circumstances; among the most cogent of which will be the fact that, upon other occasions, the prisoner had uttered false coin.—*Idem*, Roscoe's Cr. Ev. 303.

An indictment lies, under the statute of the State, for counterfeiting the current coin of the United States. *Chess* v. *The State*, 1 Blackf. 198.

The act of Congress which prohibits counterfeiting coin, &c., provides that nothing in that act shall deprive any State court of jurisdiction over the offense, under the laws of the State. Gordon's Dig., page 711—*Houston* v. *Moore*, 5 Wheaton, 1.

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Crime and punishment—felonies—possession of counterfeit coin.

Having counterfeit coin in possession.

SEC. 34. Every person who shall have in his possession any forged or counterfeit gold or silver coin which shall be at the time current or in circulation in this State, or any false, forged or counterfeit bank note or bill, with intent to put or have the same put in circulation, and knowing the same to be forged or counterfeit, shall be deemed guilty of forgery.*

A justice forging affidavit, &c.

SEC. 35. Any justice of the peace who shall affix his name to any blank form of affidavit or certificate of acknowledgment of any instrument proper to be acknowledged, and deliver the same so signed to any other person, with intent that such blank form shall be afterwards filled up and used as an affidavit or acknowledgment, such justice and such person so filling up or using such affidavit or acknowledgment, shall be deemed guilty of forgery.

Penalty for forgery.

SEC. 36. Every person duly convicted of forgery, shall be imprisoned in the State's prison not less than two, nor more than fourteen years, and fined not exceeding one thousand dollars.

Having counterfeiting apparatus in possession.

SEC. 37. If any person shall knowingly retain in his possession, any die, plate, or other apparatus made use of in forging or counterfeiting any gold or silver coin, which is or may be current or in circulation within this State, or in forging or counterfeiting bank notes or treasury notes, such person shall upon conviction thereof, be imprisoned in the State prison not less than two nor more than five years, and fined not exceeding one thousand dollars.†

Professional gambling.

SEC. 38. Any person who shall be the keeper of any gaming apparatus for the purpose of winning or gaining any article of value, or who shall get his livelihood by gaming, or who shall be found wandering about from place to place, in the

* For form of indictment, see ante, R. S. vol. 2, p. 357.

In an indictment for having in possession counterfeit bank notes, proof of intent to pass them in the county is not necessary.—8 Blackf. 281.

On an indictment for having counterfeit coin in one's possession, the prosecutor must prove, 1, the possession of the false coin; 2, the knowledge that it was counterfeit; and 3, the intent to utter or put off the same.

They will be deemed to be in the prisoner's possession if he have them in his personal custody and possession, or knowingly have them in any dwelling house or other building, lodging, apartment, field, or other place, open or inclosed, either for his own use or benefit, or for that of another.—Arch. Cr. Pl. 482.

† An indictment against a person for retaining in his possession an instrument for counterfeiting, &c., should describe by name or otherwise, the instrument retained, and allege that it was knowingly retained. *Chamberlain* vs. *The State*, 5 Blackf. 573.

An indictment charged the defendant with knowingly retaining in his possession certain dies, and plates, and other apparatus and instruments, made use of in forging, &c. Held, that the words "other apparatus and instruments" were surplusage. Held, also, that to convict the defendant, it must be proved that he knowingly retained in his possession some instrument named in the indictment. *Peoples* vs. *The State*, 6 Blackf. 95.

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habit or practice of gambling, shall be deemed a professional gambler, and upon conviction, shall be imprisoned in the State's prison not less than one year, nor more than five years, and be disfranchised for any determinate period; or may be imprisoned in the county jail not less than three nor more than six months, and disfranchised for any determinate period.

Bribery. SEC. 39. If any officer entrusted with the administration of justice, shall take any undue reward to influence his behavior in office, or if any person shall offer any such reward, he shall be fined not exceeding twice the amount of the sum so offered, or received, and be imprisoned in the State's prison not exceeding ten nor less than two years.

Perjury. SEC. 40. Any person who, having taken a lawful oath or affirmation in any matter in which by law an oath or affirmation may be required, shall upon such oath or affirmation swear or affirm, wilfully, corruptly, and falsely, touching a matter material to the point in question, shall be deemed guilty of perjury.*

*In an indictment for perjury, the oath said to be false was charged to have been administered in the circuit court by S. C. as deputy clerk. Held, that no proof of the appointment of the deputy clerk was necessary; that in administering the oath S. C. acted under the superintendence of the court; and that the oath was as obligatory as if it had been administered by one of the judges. —*Server* vs. *The State*, 2 Blackf. 35.

An indictment for perjury must show conclusively, that the testimony given by the defendant, and charged to be false, was material to the issue on the trial of which he was sworn.—*Weathers* vs. *The State*, 2 Blackf. 278.

An indictment for perjury charged the defendant with making an affidavit that a boat was, as he believed, attempting to pass a certain place, &c., whereas he did not believe the boat was attempting to pass said place, &c. Held, that the indictment was not objectionable for not alleging that the boat was not attempting to pass the place, &c.—*The State* vs. *Cruikshank*, 6 Blackf. 62.

Where a man swears that a thing is so, or that he believes it to be so, when, in truth, he does not believe it to be so, the oath is false, though the fact really be as stated.—*Ibid.*

Perjury may be committed in giving evidence before a grand jury.—*The State* vs. *Offutt*, 4 Blackf. 355.

If a witness, with an intention to deceive the jury, swear so as to make an impression on their minds that a fact material in the cause is different from what it really is, and from what he knows it to be, he is guilty of perjury.—*Scott* vs. *Mortsinger*, 2 Blackf. 454.

On an indictment for perjury, the defendant may show that the person who administered the oath alleged to be false, had no authority to administer it.—*Muir* vs. *The State*, 8 Blackf. 154.

An indictment for perjury cannot be maintained when the supposed perjury depends upon the construction of a deed.—*The State* vs. *Woolverton*, 8 Blackf. 452.

An indictment for perjury, stating that the defendant came before L., a justice, &c., and then, &c., was sworn before said L., being such justice, &c., shows, with sufficient certainty, by whom the oath was administered.—*The State* vs. *Ellison*, 8 Blackf. 225.

In such indictment alleging that on, &c., the defendant had sworn that, on, &c., at, &c., A. had feloniously taken and carried away from, &c., one hundred and twenty ears of corn, as the defendant verily believed, it was averred that A. did not on, &c., or at any other time, feloniously take and carry away one hundred and twenty ears of corn, from, &c., or any other number of ears, nor had the defendant any reason to believe, nor did he believe, that A., on, &c., or

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Crime and punishment—felonies—perjury on a voluntary affidavit.

Perjury in voluntary affidavit

SEC. 41. Every person who shall, wilfully, corruptly, and falsely, before any officer authorized to administer oaths, under oath or affirmation, voluntarily make any false certificate,

at any other time, had feloniously taken and carried away any corn from, &c. Held, that the averment was sufficient—*Ibid.*

To sustain an indictment for perjury, two witnesses, or one witness and corroborating circumstances, are indispensable.—8 Blackf. 170.

If a witness on his examination make a false statement, but afterwards correct it, so that his testimony is ultimately true, he is not guilty of perjury.—*Henry* vs. *Hamilton*, 7 Blackf. 506.

If an indictment for perjury show that the testimony alleged to be false was material to the issue, an express allegation that it was material is unnecessary. —*The State* vs. *Hall*, 7 Blackf. 25. *The State* vs. *Johnson*, 7 Blackf. 49.

The indictment in such case alleged the perjury to have been committed on a trial before a justice and a jury of six men. The trial seemed to have been with consent of parties. Held, that the consent was a waiver of whatever irregularity there might have been as to the jury.—*Ibid.*

At common law five points were necessary to constitute a case of perjury.

1. The false oath must be taken in a judicial proceeding.
2. It must be taken before a court of competent jurisdiction.
3. That part of the oath upon which the perjury is assigned, must be material to the matter then under the consideration of the court.
4. It must be false in fact; or if true, the defendant must not have known it to be so.
5. It must be taken deliberately and intentionally.—3 Inst. 165–6–7.

It is perjury where one swears wilfully, absolutely and falsely, to a matter which he believes, if he has no probable cause for believing.—6 Binn. Penn. Rep. 249.

There must be a lawful oath administered. 1 Binn. Penn. Rep. 542.

It is sufficient, *prima facie*, on an indictment for perjury, to show that the person by whom the oath was administered, was an acting magistrate; and the evidence of the individual himself may be received for that purpose.—6 N. H. Rep, 352.

It is not necessary that the particular fact sworn to should be immediately material to the issue; but it must have such a direct and immediate connexion with a material fact as to give weight to the testimony to that point. As where it becomes material to identify a flock of sheep, and a witness was asked, how he knew the sheep in question to belong to a particular individual, he said, because they were in his mark. Now, although they were not in his mark, and although the mark was immaterial, yet, as that was the medium through which he arrived at his knowledge of the important question, it had a direct tendency to strengthen his testimony, and was therefore material.—2 N. & M. S. Ca. Rep. 118.

Perjury may be committed in answering a question that has no relation to the issue, if asked with a design to impeach the credibility of the witness as to those points of the case which are material and important to the issue.—1 Murphy's N. C. Rep. 124.

To convict, two witnesses, or one witness and corroborating circumstances, are necessary, such as the direct oath of one witness, and proof of declarations of the prisoner inconsistent with the oath in which the perjury is assigned.—1 Dev. N. Ca. Rep. 266.

If a witness be asked whether goods were paid for on a particular day, and he answer in the affirmative—if the goods were really paid for though not on that particular day, it will not be perjury, unless the day be material. So, if a man swear J. S. beat another with his sword, and it turn out that he beat him with a stick, it is not perjury, for all that is not material.—1 Hawk. c. 69, 58.

If a man swear that J. N. revoked his will in his presence—if he really had revoked it, but it were unknown to the witness that he had done so, it is perjury.—Hetly, 97.

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affidavit, or statement of any nature, for any purpose, shall be deemed guilty of perjury.*

Subornation of perjury.

SEC. 42. If any person shall suborn, or procure any person to commit perjury, he shall be deemed guilty of subornation of perjury.

Penalty for perjury.

SEC. 43. Every person duly convicted of perjury, or of subornation of perjury, shall be imprisoned in the State's prison not less than two, nor more than twenty-one years, and be fined not exceeding one thousand dollars, or may be imprisoned in the county jail for any determinate period not less than one month.

Averments in indictments for perjury.

SEC. 44. In indictments for perjury in a judicial proceeding, it shall only be necessary to set forth, in the indictment, the names of the parties to the suit in which the perjury is alleged to have been committed; in what court the party charged was sworn, and by whom, averring such court or officer to have competent authority; the statement sworn to, together with the proper averments to falsify the matters whereof the perjury may be assigned; without setting forth any part of the proceedings, or the authority of the court, or officer before whom the perjury is alleged to have been committed; and in indictments for perjury in swearing to any written instrument, it shall only be necessary to set forth that part of the instrument alleged to have been falsely sworn to, and to negative the same, with the name of the officer or court before whom the instrument was sworn to.†

Incest.

SEC. 45. If any step-father shall have sexual intercourse with his step-daughter, knowing her to be such, or if any step-mother and her step-son shall have sexual intercourse together, having knowledge of their relationship, or if any parent shall have sexual intercourse with his or her child, knowing him or her to be such, or if any brother and sister, being of the age of sixteen or upwards, shall have sexual intercourse together, having knowledge of their cousanguinity, every person so offending shall be deemed guilty of incest, and, on conviction thereof, shall be imprisoned in the State prison not less than two, nor more than ten years, or may be imprisoned in the county jail not less than six nor more than twelve months.

*If an affidavit be made under an act of congress relative to the sale of public lands, and the party in making it commit perjury, he may be punished under the act of congress prohibiting the offense; but the courts of this State have no jurisdiction of the case.—*The State* vs. *Adams*, 4 Blackf. 146.

An indictment for perjury, on an oath made before a clerk of the circuit court, must show that the oath upon which it was committed was one which the clerk was competent to administer; a general averment that the clerk had competent power is insufficient.—*McGregor* vs. *The State*, 1 Carter's Ind. Rep. 232.

†See note to sec. 40 of this chap. The decision above referred to, in 1 Carter's Ind. Rep., is overruled by the provisions of the new code, in reference to criminal pleading.

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Crime and punishment—felonies—bigamy.

SEC. 46. If any person, being married, shall marry again, the former husband or wife being alive, and the bond of matrimony still undissolved, and no legal presumption of death having arisen, such person so offending shall be deemed guilty of bigamy, and, upon conviction thereof, may be imprisoned in the State's prison not exceeding five nor less than two years, or be fined not exceeding one thousand dollars, and be imprisoned in the county jail not less than three, nor more than six months. * Bigamy.

*At common law three points must be established in a case of bigamy:
1. The first marriage;
2. The second;
3. That the first wife was alive at the time of the second marriage.

If a woman marry A., and, in his lifetime, marry B.; and after the death of A., and whilst B. is alive, she marry C., she cannot be indicted for bigamy, because her marriage with B. was a nullity; but an objection to the validity applies only to the first marriage. So the marriage of an idiot, or lunatic is void. So, where a boy under 14 and a girl under 12, contract matrimony, it is void. 1 Hale 693; 1 Blacks. Com. 438.

The first wife is not, in any part of the case, but the second one is, a competent witness, when the first marriage is proven. 1 Hale 393.

It is a general rule that a marriage valid where contracted is valid everywhere, even though the parties went into another State for the purpose of evading the laws of their own State. 16 Mass. R. 157.

In those States where there are no statutes regulating marriage contracts, consent alone to a contract of marriage, in the present tense, or a contract entered into by words concerning the future, followed by consummation, makes a valid marriage.—4 John. 22.

If the first or second marriage took place abroad, circumstances should be proved sufficient to enable the jury to presume that the manner of celebration was valid according to the laws of the place.—3 Stark. 178.

Upon indictments for bigamy, it has been held not to be sufficient to prove a marriage by reputation; but that either some person present at the marriage must be called, or the original register, or an examined copy of it, be produced.

It may, also, be proved by a person who was present at the ceremony, and can speak to the identity of the parties.—Ros. Crim. Ev. 229.

The mere confession of the party is not sufficient evidence of the first marriage; but there must be proof of a marriage in fact. And proof of cohabitation will not be sufficient evidence of marriage.—7 John. 314; Arch. Cr. Pl. 477; 4 Comst. N. Y. Rep. 230.

Where a man and woman went before a justice for the express purpose of solemnizing marriage, and the man being told by the justice to join hands with the woman, dropped his hand and turned from her, upon which the woman took it up and held it during the ceremony, it was held that the marriage was valid.—7 Wend. 47.

A marriage procured by abduction, terror or fraud, is void.—1 Hopkins' N. Y. Ch. R. 478.

And such a marriage may be treated as a nullity in every court in which its validity may be incidentally drawn in question.—2 Kent's Com. 67.

Being under arrest as the putative father of a bastard, is not sufficient to avoid the contract of marriage on the ground of duress.—7 Wend. 47.

A marriage being proved, it will be presumed to be in accordance to the laws of the country where it was solemnized.—3 Pick. Mass. Rep. 297.

A second marriage by a party having previously married under the statutory age of consent, does not constitute bigamy, unless the previous marriage has been confirmed by cohabitation after age of consent, and before the second marriage.—20 Ohio Rep. 1.

In a prosecution for bigamy, the prior marriage must be proved to be valid; it will not be presumed.—*Ibid.*

A marriage by a party under the age of consent, is void, unless confirmed by cohabitation after such age; and in a prosecution for bigamy, for a subsequent

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Marriage between negro and white.

SEC. 47. No person having one eighth part or more of negro blood, shall be permitted to marry any white woman of this State, nor shall any white man be permitted to marry any negro woman, or any woman having one eighth part or more of negro blood, and every person who shall knowingly marry in violation of the provisions of this section, shall upon conviction thereof, be imprisoned in the State's prison not less than one, nor more than ten years, and be fined not less than one thousand nor more than five thousand dollars.

Injuring telegraph.

SEC. 48. Any person who shall wilfully or maliciously injure any telegraph-pole, or wire thereof, upon conviction, shall be imprisoned in the State's prison not more than two years, or fined not exceeding five hundred dollars, and imprisoned in the county jail not less than three nor more than six months.

Abettors to suffer same penalties as principals.

SEC. 49. Every person who shall be aiding or abetting in the commission of any crime or offense specified in this act, or who shall counsel, encourage, hire, command or otherwise procure such crime or offense to be committed, shall suffer the same punishment and penalties which are by law prescribed for the punishment of the principal.*

Accessory after the fact.

SEC. 50. Every person not standing in the relation of husband or wife, parent or grand-parent, child or grand-child, brother or sister, by consanguinity or affinity, or master or apprentice, to any person guilty of any felony, who shall, after the commission of such crime, harbor, conceal or assist any such offender, with intent that he shall escape from detection or punishment, shall be deemed an accessory after the fact,

marriage, the State must prove such confirmation,—the defendant is not bound to prove that he dissented from the contract after arriving at such age.—*Ibid.*

The admissions of the defendant may be given in evidence in a prosecution for bigamy, to prove the prior marriage.—*Ibid.*

Evidences of two marriages, the former of which is void, will not sustain an indictment for bigamy.—*Ibid.*

A mere presumption in favor of a prior marriage, it seems, is at least neutralized by the presumption against the commission of crime in contracting a subsequent marriage.—4 Comst. N. Y. Rep. 230.

*It is not necessary that the defendant should be actually present; if he be outside the house watching to prevent surprise, this would be constructive presence. Nor is it necessary to prove that he actually aided in the commission of the offense, if he watched for his companions, in order to prevent surprise.

The accessory may controvert the guilt of the principal. (Fost. 365) So, he may prove that after he had so ordered, hired or advised J. S., he repented of it, and countermanded the order, &c. (1 Hale, 617.) So, if it appear that the accessory ordered or advised one crime, and that the principal committed another, as, for instance, if he commanded J. S. to burn a house, and he committed a larceny, he must be acquitted. (1 Hale, 617.) So, if J. W. ordered J. S. to commit a crime against A., and instead of doing so, he wilfully committed the same crime against B., J. W. would not be answerable as accessory; but if J. S. had committed the offense against B. by mistake, it would be otherwise. (3 Inst. 51: *Contra*, 1 Hale, 617.) But it is clear that the accessory is liable for all that ensues upon the execution of the unlawful act commanded; as, for instance, if A. command B. to beat C., and he beat him so that he die, A. is accessory to the murder.—4 Blacks. Com. 37.

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and upon conviction thereof shall be imprisoned in the State's prison not less than one, nor more than five years.*

Accessory may be indicted before or after principal.

SEC. 51. Every person who shall be guilty of any crime punishable by the provisions of the last two preceding sections, may be indicted and convicted before, or after the principal offender is indicted and convicted.

Officer letting prisoner escape, when punishment is death.

SEC. 52. If any officer whose duty it may be to have the custody of any prisoner charged with, or convicted of any crime, the punishment for which is death, shall voluntarily suffer such prisoner to escape, such officer, on conviction, shall be imprisoned in the State's prison not more than twenty-one, nor less than two years.

Same, when imprisonment is the punishment.

SEC. 53. If any officer, whose duty it may be to have the custody of any prisoner charged with, or convicted of any felony, the punishment for which is confinement in the State's prison, shall voluntarily suffer such prisoner to escape from his custody, such officer, upon conviction thereof, shall suffer the punishment incident to the crime with which such prisoner, thus escaping, shall have been charged or convicted.

Other person procuring such escape.

SEC. 54. If any other person than the officer who has the custody of any prisoner charged with, or convicted of a felony, shall aid, or accomplish the escape of any such prisoner, such person, on conviction thereof, shall be imprisoned in the State's prison, not more than twenty-one nor less than two years.

Escaping convict.

SEC. 55. Every convict confined in the State's prison, who shall escape therefrom, upon conviction, shall be imprisoned in the State's prison, not exceeding double the length of time for which such escaping convict was originally sentenced, to commence from the expiration of the original term of his or her imprisonment.

Same.

SEC. 56. If any prisoner confined in the State's prison shall escape therefrom, he or she may be retaken, and imprisoned again, notwithstanding the term for which he or she was sentenced to be imprisoned may have expired when he or she shall be retaken, and shall remain so imprisoned until tried for such escape, or until he or she be discharged on a failure to prosecute therefor.

Imprisonment of female.

SEC. 57. Upon the conviction of any female of any crime or offense specified in this act, the punishment for which is

* See ante, R. S. vol. 2, p. 369.

1. The prosecutor must prove the principal guilty of the felony to which he is charged with being accessory.

2. He must prove that the defendant received, harbored, or maintained the principal, after he had committed the felony; as, for instance, if he shut the door on the principal's pursuers, until he should have an opportunity to escape.

3. It must be proved that the defendant knew that the principal had committed the felony at the time. This knowledge may be presumed from the circumstances, or may be proved by the defendant's admissions, or the like.—3 P. Wms. 439; Arch. Pl. and Ev. 348; 3 Bl. Com. 372.

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confinement in the State's prison, she may, instead of such punishment, be imprisoned at hard labor in the jail of the county, under the direction of the jailor.

Imprisonment of minor.

SEC. 58. Whenever any person under the age of twenty-one years, shall be convicted of any crime, the punishment for which is confinement in the State's prison, the jury may substitute imprisonment in the county jail for any determinate period.

Convicts to be kept at labor.

SEC. 59. Whenever any person is imprisoned in the State prison, he or she shall be kept at hard labor therein, during the period for which such person was sentenced.

This act, how construed.

SEC. 60. Nothing herein contained shall be construed to affect any prosecution pending at the time this act shall be duly published.

CHAPTER 6.

AN ACT defining Misdemeanors and prescribing punishment therefor.*

[APPROVED JUNE 14, 1852.]

Challenge to fight a duel.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana:* Every person who shall give or accept a challenge to fight a duel, or who shall agree to go out of this State for the purpose of fighting a duel, or under pretense of fighting a duel, or who shall knowingly carry to another person a challenge to fight a duel, shall, upon conviction thereof be fined in any sum not less than one hundred dollars, and be imprisoned not exceeding one year in the jail of the proper county, and ever after be ineligible to any office of trust or profit.†

Duel where death does not ensue.

SEC. 2. Every person who shall fight a duel, if death do not ensue, on conviction, shall be fined in any sum not less than one hundred dollars, and be imprisoned in the jail of the proper county for any term of time not exceeding one year, and shall ever afterwards be ineligible to any office of trust or profit.

* Many decisions of the supreme court relating to the *validity of indictments*, are referred to in the notes to this act, because they disclose the *character of evidence* necessary to make out the offenses in question, whether predicated upon an affidavit or indictment.

† The giving a verbal challenge to fight a duel, is an indictable offense. — *The State* vs. *Perkins*, 6 Blackf. 20.
See Art. II, Sec. 7, State Constitution.

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Misdemeanors—simple mayhem—riot.

Simple mayhem

SEC. 3. Every person who shall violently and unlawfully deprive another of the use of any bodily member, or who shall unlawfully and wilfully disable the tongue or eye, or slit or bite the nose, ear, or lip of another, shall be deemed guilty of simple mayhem, and upon conviction, shall be fined not exceeding two thousand dollars, nor less than five hundred dollars, [five dollars,*] and may be imprisoned in the county jail not exceeding six months, and not less than twenty days.†

Riot.

SEC. 4. If three or more persons shall do an act in a violent and tumultuous manner, they shall be deemed guilty of a riot, and, upon conviction thereof, shall be fined not exceeding five hundred dollars each, to which may be added imprisonment in the county jail for any time not exceeding three months.‡

* This penalty should be $5 00, but has been erroneously enrolled to read $500.

† See ante, R. S. vol. 2, p. 400.

Son assault is a good defense to an indictment for mayhem; but the defense can only be sustained by proof that the resistance was in proportion to the injury offered.—*Hayden* vs. *The State*, 4 Blackf. 546.

‡ If three or more persons do an unlawful act of violence—as if they violently and unlawfully burst open the door of another person's dwelling house, &c.—the offense is indictable under the statute.—*The State* vs. *Scaggs*, 6 Blackf. 37.

Indictment against three persons for a riot. Plea, not guilty. Verdict of guilty as to one, and of not guilty as to the others. Held, that upon this verdict, a judgment could not be rendered against the defendant found guilty. Aliter, if the indictment had been against the defendants, together with others whose names were unknown.—*Turpin* vs. *The State*, 4 Blackf. 72.

If an indictment for a riot contain a clause charging a particular act, which might have been omitted altogether without rendering the indictment insufficient, it ought not to be quashed because such clause does not contain an averment that such act was done riotously.—See 5 Blackf. 365.

Indictments against several persons for a riot. The defendants, on a joint trial, were found guilty, and separately fined by the jury. Judgment accordingly. Held, that the prosecuting attorney was entitled to a docket fee against each of the defendants.—*The State* vs. *Cripe*, 5 Blackf. 6.

If a number of persons assemble in a town in the dead of night, and by noise, or otherwise, disturb the peaceable citizens, it is riot.—Addis. 277.

If several persons assemble together for an unlawful purpose, every one of them is guilty of all the unlawful acts done in execution of, or contributing to, that purpose. If they meet for a lawful purpose, and proceed to do an unlawful act, it is a riot.—*Ibid.*

It is the duty of every good citizen to endeavor to suppress a riot; and when the rioters are engaged in treasonable practices, the law protects other persons in repelling them by force.—1 Yates 419.

To make a man a party to a riot, he must be active either in countenancing, supporting, or doing, or ready, if necessary, to support the unlawful act.—Addis. 191.

Collecting a party for any purpose of a violent tendency, renders the authors guilty of all consequences plainly to be foreseen.—Addis. 277.

In an indictment for a riot against one settler for burning the cabin of another, on land claimed by both, the defendant was permitted to show that he had made lines round the land as evidence of possession, circumscribed by reasonable limits.—Addis. 333.

It seems to be clearly agreed, that in every riot there must be some such circumstances either of actual force, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armor, threat-

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Rout.

SEC. 5. If three or more persons shall meet together to do an unlawful act upon a common cause, and shall make advances towards the commission thereof, they shall be deemed guilty of a rout, and, upon conviction, shall be fined not exceeding one hundred dollars, or may be imprisoned in the county jail not exceeding sixty days.

Affray.

SEC. 6. If two or more persons by agreement, fight in any public place, the person so offending, shall be deemed guilty of an affray; be fined not exceeding twenty dollars, or imprisoned not exceeding five days each.*

Assault and battery.

SEC. 7. Every person who in a rude, insolent or angry manner, shall unlawfully touch another, shall be deemed guilty of an assault and battery, and upon conviction, shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months.†

ening speeches, or turbulent gestures; for every such offense must be laid to be done *in terrorum populi*. (1 Hawk. P. C. ch. 65, sec. 5.) But it is not necessary, in order to constitute this crime, that personal violence should have been committed.—2 Camp. 369.

It is possible for three persons or more to assemble together with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a man assemble a number of persons to carry away a piece of timber or other thing to which he claims a right, and which cannot be carried away without a number of persons, this will not of itself be a riot, if the number of persons are not more than are necessary for the purpose; and if there are no threatening words used, or any other disturbance of the peace; even though another man has a better right to the thing carried away, and the act therefore is wrong and unlawful. (1 Hawk. P. C. ch. 65; 11 Moo. 117; Dalt. ch. 137.) Much more may any person, in a peaceable manner, assemble a fit number of persons to do any lawful thing, as to remove any common nuisance, or any nuisance to his own house or land. And he may do this before any prejudice is received from the nuisance, and may also enter into another man's ground for the purpose. Thus, where a man having erected a weir across a common navigable river, divers persons assembled with spades and other instruments necessary for removing it, and dug a trench in the land of the man who made the weir, in order to turn the water, and the better to remove it, and thus remove the nuisance, it was holden not to be a forcible entry, nor a riot.—Dalt. ch. 137; 5 Burn. Riot, s. 1.

If three or more persons assist a man to make a forcible entry into lands to which one of them has a good right of entry; or if the like number, in a violent and tumultuous manner, join together in removing a nuisance or other thing, which may be lawfully done in a peaceable manner, they are as properly rioters as if the act intended to be done by them were ever so unlawful. (1 Hawk P. C. ch. 65, sec. 7.) And if in removing a nuisance, the persons assembled use any threatening words, (such as, they will do it though they die for it, and the like,) or in any other way behave in apparent disturbance of the peace, it seems to be a riot.—Dalt. ch. 137; 5 Burn. Inst. Riot, sec. 1.

If any person encourage or promote, or take a part in riots, whether by words, signs or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter; for in this case all are principals.—2 Campb. 370; 4 Burr, 2073; 1 Hale, 463; 1 Kenyon's Rep. 108.

*Indictment against two persons for an affray. The only proof was, that the defendants were seen in close combat, lying on the ground. Held, that this evidence was not sufficient to support the indictment.—*Klum* vs. *The State*, 1 Blackf. 377.

†Any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, such as spitting in

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Misdemeanors—assault and battery.

his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law. (1 Bacon's Ab., Ass. and Bat.) For the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any, the slightest, manner.—4 Blacks. Com. 120.

The injury need not be effected directly by the hand of the party. Thus, there may be an assault and battery by encouraging a dog to bite; by riding over a person with a horse, or by wilfully and violently driving a cart, &c., against the carriage of another person, and thereby causing bodily injury to the persons traveling in it. (Cro. Circ. Comp. 65; 3 Chit. Cr. L. 823, 824, 825; 2 Starkie Cr. P. C. 388, 389.) And it seems that it is not necessary that the assault should be immediate; as where the defendant threw a lighted squib into a market-place, which, being tossed from hand to hand by different persons, at last hit the plaintiff in the face, and put out his eye, it was adjudged that this was actionable as an assault and battery. (2 Blac. Rep. 892; 3 Wils. 403, S. C.) And the same has been holden where a person pushed a drunken man against another, and thereby hurt him (Bul. Ni. Pri. 16.) But if such person intended doing a right act, as to assist the drunken man, or to prevent him from going along the street without help, and in so doing a hurt ensued, he would not be answerable.—*Ibid.*

To lay one's hand gently on another whom an officer has a warrant to arrest, and to tell the officer that this is the man he wants, is said to be no battery. (1 Hawk. P. C. 62, sec. 2; 1 Bac. Ab. Ass. and Bat., *B.*) And if the injury committed were accidental and undesigned, it will not amount to a battery. Thus, if one soldier hurt another by discharging a gun in exercise, it will not be a battery. (Hob. 134; 2 Roll. Abr. 548; 1 Bac. Abr. Ass. and Bat., *B.*) And it is no battery if, by a sudden fright, a horse run away with his rider, and run against a man. (4 Mod. 405; S. C. Salk. 607.) So where, upon an indictment for throwing down skins in a man's yard, being a public way, by which a person's eye was beaten out, it appeared by the evidence that the wind blew the skin out of the way, and that the injury was caused by this circumstance, the defendants were acquitted. (1 Str. 190.) It seems, also, that if two, by consent, play at cudgels, and one happen to hurt the other, it would not amount to a battery, as their intent was lawful and commendable, in promoting courage and activity.—1 Bac. Abr. Ass. and Bat., *B.*; Dalt. ch. 22.

If an officer having a warrant against a person who will not suffer himself to be arrested, beat or wound him, in the attempt to take him; or if a parent in a reasonable manner, chastise his child, or a master his servant, being actually in his service at the time; or a school-master his scholar; or if one confine a friend who is mad, and bind and beat him, &c., in such a manner as is proper in such circumstances; or if a man force a sword from one who offers to kill another therewith; or if a man gently lay his hands upon another, and thereby stay him from inciting a dog against a third person; no assault or battery will be committed by such acts. (1 Hawk. P. C. ch. 60, sec. 23; 1 Bac. Abr. Ass. and Bat., *C.*; Poph. 12, 13.) So, if A. beat B., (without wounding him, or throwing at him a dangerous weapon,) who is wrongfully endeavoring, with violence, to dispossess him of his lands, or of the goods, either of himself or any other person, which have been delivered to him to be kept, and will not desist upon A.'s laying his hands gently upon him, and disturbing him; or if a man beat, wound or maim one who is making an assault upon his own person, or that of his wife, parent, child, or master; or if a man fight with, or beat one who attempts to kill any stranger; in these cases, also, it seems that the party may justify the assault and battery.—1 Hawk. P. C. ch. 60, sec. 23; 6 Connect. Rep. 453; 1 Bac. Abr. Ass. and Bat., *C.*

A wife may justify an assault in defense of her husband.—1 Ld. Raym. 62.

The city of Madison brought an action of debt before the mayor thereof, claiming a sum not exceeding twenty dollars. The suit, which was founded on an ordinance of the city, was for an assault and battery committed by the defendant within the city. Judgment against the defendant by the mayor for twenty dollars. Held, that the mayor, though he was by the charter, *ex officio*, a justice of the peace, had no jurisdiction under the constitution of the State, to render such judgment.—*The City of Madison* vs. *Hatcher*, 8 Blackf. 341.

A person indicted for an assault and battery with intent to murder, may be

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Misdemeanors—nuisance.

Nuisance.

SEC. 8. Every person who shall erect, or continue and maintain any public nuisance, to the injury of any part of the citizens of this State, shall be fined not exceeding one hundred dollars.*

found guilty of a simple assault and battery.—*The State* vs. *Kennedy*, 7 Blackf. 233.

*See ante, R. S., vol. 2, p. 175.

A public and disorderly liquor and store house in a town, in and about which dissolute persons are permitted, for lucre, to remain at night and in the day time, drinking, tippling, carousing, swearing, hallowing, &c. to the damage, disturbance, &c., is a public nuisance.—*The State* vs. *Bertheol*, 6 Blackf. 474. See also, 8 Blackf. 260.

A common nuisance is any thing which worketh hurt, inconvenience or damage to the public, such as disorderly inns, ale houses, gaming houses, &c.—3 Blacks. Com. 215.

Common stages for rope dancers and mismanaged theatres are nuisances, because their tendency is to encourage idleness, to corrupt the public morals, and to draw together numbers of disorderly persons, to the annoyance of the neighborhood.—5 Bac. Abr. 147.

So is making a great noise in the night with a speaking trumpet a nuisance. —*Rex* vs. *Smith*, 2 Strange, 704.

On the trial of an indictment for establishing a noxious trade, near certain dwellings, &c., the defendant may prove in bar of the prosecution, under the general issue, that the dwelling-house in the vicinity of the place, &c., was built after the establishment of the alleged nuisance.—*Ellis* vs. *The State*, 7 Blackf. 534.

Where a mill is injured by obstructing the stream on which it stands, and suit is brought for the injury, that the mill-dam is a public nuisance is no defense to the suit.—*Haller et al.* vs. *Pine*, 8 Blackf. 175.

The keeping in a public place of a "certain common ill-governed, and disorderly room," and procuring and suffering for lucre, disorderly persons to meet and remain therein by night and by day, "drinking, tippling, cursing, swearing, quarrelling, making great noises, rolling bowls in and at a game commonly called ten pins," is a public nuisance.—*Bloomhuff* vs. *The State*, 8 Blackf. 205.

If, on an indictment for a nuisance against three persons, the jury find one guilty and say nothing as to the others, judgment may be rendered against the one found guilty.—*Ibid.*

A conviction on an indictment charging a nuisance in the above language, does not authorize the court to order the "ball alley" to be abated.—*Ibid.*

If the annoyance is only to some particular person, and not to the community in general, it is only a *private* nuisance, and is a subject of civil action only.— Stephen's Cr. L. 102.

All nuisances of a public nature, though occasioned by acts in themselves innocent, are punishable as misdemeanors, if the nuisance be the probable consequence of the act. (Arch. 2.) Obstructing a highway is within this rule. (10 Serg. & Rawle, 345.) So is drunkenness, if it is open and exposed to public view, (3 Murphy, 229.) Offensive or dangerous trades or manufactures, are punishable as nuisances; and it is not necessary to prove that they are offensive to health, if they are offensive to the senses, (Steph. Cr. L. 103; 2 Car. & Payne, 485.) But it must appear either that they are destructive to health, or make the dwellings of the inhabitants uncomfortable, (5 Esp. 217.)

If the annoyance is only to a few inhabitants of a particular place, no information lies. If a man set up a noxious trade, remote from houses, &c., and afterwards, new houses, &c., are built, he may lawfully continue the trade, though a nuisance to the new comers, (2 Car. & Payne, 483.) Exposing in a public thoroughfare a person infected with a contagious disease, has also been decided to be a nuisance, (4 Maule & Selw. 73, 272.) Keeping disorderly houses, bawdy houses, gaming houses, unlicensed booths, and the like, are also misdemeanors coming under the head of nuisances.—Step. Cr. L. 105.

An indictment for a nuisance, by steeping stinking skins in water, laying it to be committed near the highway, and also near several dwelling houses, has been held sufficient; and the court said, that if a man erect a nuisance near the highway, by which the air thereabouts is corrupted, it must in its nature be a nui-

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Abating nuisance.

SEC. 9. After any person shall have been convicted of erecting or maintaining any public nuisance, the court may make it a part of the judgment, that such nuisance be removed by the proper officer, and no proceeding regulating the writ of *ad quod damnum*, shall bar any prosecution under this and the preceding section.

Place where liquors are sold, nuisance, when.

SEC. 10. All places wherein intoxicating liquors are sold if kept in a disorderly manner, shall be deemed public nuisances; and every person who shall erect, continue or maintain any such nuisance, to the annoyance or injury of any part of the citizens of this State, shall upon conviction, be fined for every day the same is so kept, not less than twenty, nor more than one hundred dollars.*

sance to those who are in the highway, (1 Str. 686.) And an indictment was held good for a nuisance in erecting buildings, and making fires which sent forth noisome, offensive, and stinking smokes, and making great quantities of noisome, offensive, and stinking liquors near to the king's common highway, and near to the dwelling houses of several of the inhabitants, whereby the air was impregnated with noisome and offensive stinks and smells, (1 Burr. 333.) Upon the report of the evidence it appeared that the smell was not only intolerably offensive, but also noxious and hurtful, and made many persons sick, and gave them headaches; and it was held that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable; and further, that the existence of the nuisance depended upon the number of the houses and the concourse of people, and was a matter of fact to be judged of by the jury.—1 Burr. 337.

In 5 Bac. Abr., Nuisance, (A) it is said, "It seems the better opinion that a brewhouse, glasshouse, chandler's shop, and a sty for swine, set up in such inconvenient parts of a town that they cannot but greatly incommode the neighborhood, are common nuisances."

If a person be only a lodger, and have but a single room, yet if she make use of it to accommodate people in the way of a bawdy-house, it will be keeping a bawdy-house as much as if she had a whole house.—2 Ld. Raym. 1197; 1 Salk. 382.

It will be no excuse for the defendant that the nuisance, for which he is indicted, has been in existence for a great length of time; as, however twenty years' acquiescence may bind parties whose private rights only are affected, yet the public have an interest in the suppression of public nuisances though of longer standing, (7 East, 199.) It has been held that a party could not defend the putting his woodstack in the street before his house, on the ground that it was according to the ancient usage in the town, he leaving sufficient room for passengers; for it is against law to prescribe for a nuisance, (Cro. Jac. 446.) And Lord Ellenborough, C. J., said in a late case, "It is immaterial how long the practice may have prevailed, for no length of time will legitimate a nuisance. The stell fishery across the river at Carlisle had been established for a vast number of years. But Mr. Justice Buller held that it continued unlawful, and gave judgment that it should be abated," (3 Campb. 227.) But in some cases length of time may concur with other circumstances in preventing an obstruction from having the character of a nuisance: as where, upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used for a market for the sale of clothes, for above twenty years, and that the defendant put the bags there for the purpose of sale; Lord Ellenborough, C. J., said that after twenty years' acquiescence, and it appearing to all the world that there was a fair or market kept at the place, he could not hold a man to be criminal who came there under the belief that it was such fair, or market, legally instituted.—4 Esp. 111.

* The defendant in an indictment for keeping a disorderly tippling house, might be liable, though the quarrelling, fighting, &c. were in the street. The State is not bound to prove that the defendant knew of the alleged annoyance, &c.—*Cable* vs. *The State*, 8 Blackf. 531.

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Misdemeanors—unwholesome provisions—forcible entry and detainer.

Selling unwholesome provisions.

SEC. 11. Every person who shall knowingly sell any unwholesome for wholesome provisions, shall be fined not exceeding one hundred dollars.

Forcible entry, or detainer.

SEC. 12. Every person who shall violently take or keep possession of any lands, with menaces, force and arms, and without authority of law, shall be deemed guilty of forcible entry, or forcible detainer, as the case may be, and upon conviction, shall be fined not exceeding one thousand dollars.*

*A forcible entry must regularly be with a strong hand, with unusual weapons, or with menace of life or limb; it must be accompanied with some circumstances of actual violence or terror; and an entry which has no other force than such as is implied by the law in every trespass, is not within these statutes. (3 Bac. Abr. Forcible Entry, &c, *Dc.*; Dalt. 300; 1 Hawk. P. C., ch. 64, sec. 25.) An entry may be forcible, not only in respect of a violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession; but also in respect of any other kind of violence, in the manner of the entry, as by breaking open the doors of a house, whether any person be in it at the time or not, especially if it be a dwelling house, and perhaps also by an act of outrage after the entry, as by carrying away the party's goods, &c.—1 Hawk. P. C., ch. 64, sec. 26.

If one find a man out of his house, and forcibly withhold him from returning to it, and send persons to take peaceable possession of it in the party's absence, this, according to the better opinion, is a forcible entry. (1 Hawk. P. C., ch. 64, sec. 26.) And there may be a forcible entry where a person's wife, children, or servants, are upon the lands to preserve the possession; because, whatever a man does by his agents is his own act. 3 Bac. Abr., Forcible Entry, &c., *B.*

Whenever a man, either by his behavior or speech, at the time of his entry, gives those who are in possession of the tenements which he claims just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible; whether he cause such a terror by carrying with him an unusual number of servants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force, or by actually threatening to kill, maim or beat those who shall continue in possession, or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance. (1 Hawk. P. C. 64, sec. 27; Eng. Com. L. Rep. xii. 5.) And though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of possession by threats, it is a forcible entry. (Dalt. 299; 3 Bac. Abr., Forcible Entry, &c., *B.*) But threatening to spoil the party's goods, or destroy his cattle, or do him any similar damage, which is not personal, if he will not quit the possession, seems not to amount to a forcible entry. Co. Lit. 257; Bro. tit. Duress. 12, 16; 1 Hawk. P. C., ch. 54, sec. 28.

Drawing a latch and entering a house seem not to be a forcible entry according to the better opinion. (3 Bac. Abr. Forcible Entry, &c. B. 1 Hawk. P. C. chap. 64, sec. 26.) So if a man open the door with a key, or enter by an open window; or if the entry be without the semblance of force, as by coming in peaceably, enticing the owner out of possession, and afterwards excluding him by shutting the door, without other force, these will not be forcible entries. —4 Com. Dig. Forcible Entry, &c. (A. 3.)

All who accompany a man when he makes a forcible entry will be deemed to enter with him, whether they actually come upon the lands or not. (1 Hawk. P. C. chap. 64, sec. 22.) So if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one, only, use force, it is a forcible entry in them all, because they come in company to do an unlawful act. (3 Bac. Abr. Forcible Entry, &c. B.) But he who barely agrees to a forcible entry made to his use, without his knowledge or priority, is not within the statutes, because he did not concur in, or promote the force.—1 Hawk. P. C. chap. 64, sec. 24.

Forcible *detainer* is where a man who enters peaceably, afterwards detains his possession by force; and the same circumstances of violence or terror which will make an entry forcible, will also make a detainer forcible. From whence it seems to follow that whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the

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Misdemeanors—malicious trespass—cutting trees, &c.

Malicious trespass.

SEC. 13. Every person who shall maliciously, or mischievously injure, or cause to be injured, any property of another, or any public property, shall be deemed guilty of a malicious trespass, and be fined not exceeding two fold the value of the damage done, to which may be added imprisonment not exceeding twelve months.*

Trespass on land—cutting trees, &c.

SEC. 14. Every person who shall injure any tree, or sapling, on the land of any other person, or on land belonging to the State, or to any county or township therein, or on any land reserved or granted for the use of schools or seminaries, without a license so to do from competent authority, or who,

former possessor, if he dare return, is guilty of a forcible detainer, though no attempt be made to re-enter; and it has been said that he also will come under the like construction who places men at a distance from the house in order to assault any one who shall attempt to make an entry into it; and that he is in like manner guilty who shuts his doors against a justice of the peace coming to view the force, and obstinately refuses to let him come in. (1 Hawk. P. C. chap. 64, sec. 30.) This doctrine will apply to a lessee who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined.—4 Com. Dig. Forcible Detainer, (B. 1.)

But a man will not be guilty of the offense of forcible detainer for merely refusing to go out of a house, and continuing therein in despite of another. (1 Hawk. P. C. chap. 64, sec. 30.) So that it is not a forcible detainer if a lessee at will, after the determination of the will, deny possession to the lessor, when he demands it; or shut the door against the lessor when he would enter; or if he keep out a commoner, by force, upon his own land.—4 Com. Dig. Forcible Detainer, (B. 2.)

* An indictment charged the defendant with having, by shooting, maliciously wounded and injured a young mare, the property of A., of the value of 80 dollars. Held, that the indictment was bad, under the statute, for not stating the amount of damages sustained by the injury complained of.—*The State* vs. *Peden*, 2 Blackf. 371.

An indictment for a malicious trespass need not state the means used to effect the injury.—*The State* vs. *Merrill*, 3 Blackf. 346.

An indictment, charging that the defendant unlawfully, maliciously, &c., destroyed, and maliciously caused to be destroyed, a certain quantity of potatoes, &c., cannot be objected to on the ground that it contains two distinct offences.—*The State* vs. *Kuns*, 5 Blackf. 314.

An indictment for malicious trespass alleged that the defendant "maliciously and mischievously injured and caused to be injured a certain house, the property of one William McMahon, situate, &c., of the value of fifty dollars, to the damage of said William McMahon, five dollars, contrary," &c. Held, that the offense was insufficiently described. The indictment should have shown the specific injury done the house.—*The State* vs. *Aydelott*, 7 Blackf. 157.

An indictment having a venue in the margin, and alleging that the defendant on, &c. did unlawfully, &c. destroy, &c. a certain mare, by then and there fastening, &c. sufficiently shows the place where the offense was committed. The indictment charged that the defendant did unlawfully, &c. destroy and injure, and cause to be destroyed and injured, a certain mare, &c. Held, that the indictment was sufficient.—*The State* vs. *Slocum*, 8 Blackf. 315.

An indictment for malicious trespass charged that the defendant malicously destroyed, &c. divers windows of the county seminary building, &c. the property of the county of Sullivan, &c. Held, that the indictment was good as in effect charging a malicious injury to public property. Held, also, that the injury charged was stated with sufficient certainty.—*Read* vs. *The State*, 1 Carter's Ind. Rep. 511.

The maliciously killing a dog, under our statute, is indictable as malicious mischief.—*The State* vs. *Sumner*, 2 Carter's Ind. Rep. 377.

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without such license, shall cut down or remove from any such lands, or from lands belonging to the United States, any trees, stone, timber, or other valuable article, shall be deemed guilty of a trespass, and, upon conviction, shall be fined in five times the value of such property; and any person concerned in such trespass, may be compelled to testify against any other person therein concerned; and in case of lands belonging to the United States, it shall be sufficient to prove that such lands are reputed in the neighborhood to belong to the United States.*

Actual settlers exempt.

SEC. 15. Nothing contained in the last preceding section shall be construed to make guilty of trespass, actual settlers upon public lands who may cut timber, and use stone, for their own farming purposes, upon the land upon which they may reside.

Obstructing navigation.

SEC. 16. Every person who shall erect, maintain, or continue, any artificial obstruction, in or across the bed or channel of any navigable stream, the bed or channel whereof may not have been surveyed and sold as land by the United States, shall be fined not less than three nor more than five hundred dollars for each week such artificial obstruction may have been maintained or continued.†

Bribery of jury.

SEC. 17. Every person who shall attempt to influence a jury by promises, entreaties, money, entertainments, or the like, or who, being a juror, shall take gain for giving a verdict, shall be fined not exceeding five hundred dollars, be imprisoned not exceeding six months, and be ever after incapable of serving as a juror.

Malicious prosecution.

SEC. 18. If any person shall maliciously, without probable cause, attempt to cause an indictment to be found, or other prosecution, for any crime or misdemeanor to be commenced against any person, or if two or more persons shall conspire together for that purpose, the person so sought to be indicted or otherwise prosecuted, being innocent, such person or persons so offending, shall be fined not exceeding one thousand dollars, be imprisoned not exceeding six months, and be ever

* It is not sufficient in an indictment under the statute prohibiting the cutting down of any timber-trees, &c. to charge that the defendant cut a certain timber-tree, &c.—*Maskill* vs. *The State*, 8 Blackf. 299.

† For the requisites of an indictment on this section, see *Cox* vs. *The State*, 3 Blackf. 193.

The provisions of this section are constitutional and valid.—*Ibid.*

The public have a right of way in navigable streams within this State, which right cannot be interrupted by the owners of the banks of such stream.—*Ibid.*

Neither the State legislature nor Congress can authorize the erection of obstructions in any navigable stream within the State.—*Ibid.*

See 2 Peters' Rep. 245; 17 Johns. Rep. 225, 195.

A river in this State may be navigable and a public highway, without its having been declared to be so by the legislature.—*Martin et al.* vs. *Bliss*, 5 Blackf. 35. See post, title "Obstructing Highway."

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after incapable of serving as a juror, giving evidence as a witness or voting at any election.

Common barrator.

SEC. 19. Every person who shall frequently excite quarrels, or lawsuits among the citizens of this State, shall be deemed a common barrator, and, upon conviction shall be fined not exceeding five hundred dollars, and be imprisoned not exceeding six months.*

Usurpation.

SEC. 20. Every person who shall officiate in any place of authority, without being legally authorized, shall be deemed guilty of usurpation, and, upon conviction, be fined not exceeding five hundred dollars.

Open adultery or fornication.

SEC. 21. Every person who shall live in open and notorious adultery or fornication, shall be fined in any sum not exceeding three hundred dollars and imprisoned not exceeding three months. †

Public indecency.

SEC. 22. Every person who shall be guilty of notorious lewdness, or other public indecency, upon conviction shall be fined not exceeding one hundred dollars, and imprisoned not exceeding three months.‡

Charging unlawful toll or ferriage, &c.

SEC. 23. If any ferryman, ferry-owner, ferry keeper, or keeper of a toll bridge, himself, or by any person in his employment, shall demand or receive any greater fee on account of ferriage or toll than is or may be fixed by law, or by the proper board doing county business, as the rates of ferriage

* The books are not perfectly explicit, whether three acts of barratry are absolutely, and in all cases necessary to constitute the perpetrator of them a common barrator. The commencing of three suits, where one may serve every justifiable purpose, may be evidence of three acts of barratry, if particular directions were given to the attorney, with a malicious design to harrass and oppress the debtor. But if there is no evidence of such direction, from which an inference may be drawn of an intention to oppress, the indictment cannot be supported, for without such evidence there is no barratry.—15 Mass. Rep. 227.

The moving and exciting of criminal prosecutions is barratry; and this though a wrong may have been done or a petty offense committed, if the motive were bad. A magistrate, as well as a private person, is liable to be indicted for this offense.—1 Baily (S. Car.) 379.

† If but one of the persons be married, the offense is nevertheless adultery as to both of them. See *The State* vs. *Pearce*, 2 Blackf. 318.

It has been held by our supreme court, that if a man have illicit intercourse with his wife's sister, he is not guilty of incest, but of fornication or adultery. See *Dukes* vs. *Clark*, 2 Blackf. 20.

An indictment for living in open and notorious adultery, &c., is not sustained by evidence of occasional illicit intercourse, &c.—*Wright* vs. *The State*, 5 Blackf. 358.

An indictment against an unmarried man for living in open and notorious fornication with a certain woman, need not aver that she is unmarried.—7 Blackf. 468.

‡ In a late case it was held to be an indictable offense for a man to undress himself on the beach, and to bathe in the sea near inhabited houses, from which he might be distinctly seen, although the houses had been recently erected, and, until their erection, it had been usual for men to bathe in great numbers at the place in question. McDonald, C. B., ruled that whatever place becomes the habitation of civilized men, there the laws of decency must be enforced. (2 Campb. 89.) And to show a being of unnatural and monstrous shape, for money, is a misdemeanor —2 Chu. Ca. 110.

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or toll to be received by such person, or shall fail to cause the bridge or banks of the stream over or upon which the ferry or such bridge may be situate, to be kept in good condition, for the passage of loaded wagons, or shall fail to give all attendance to such ferry or bridge, according to the laws then in force for the regulation of ferries or bridges, upon conviction, he shall be fined not exceeding one hundred dollars, or be imprisoned not exceeding one month.

Unlicensed ferry.

SEC. 24. If any person, other than a ferry keeper, licensed according to law, shall, for reward, or any expectation or promise thereof, set any person over any stream whereon public ferries are established, or shall hire to any person, a boat to be used in ferrying at any place within two miles of such public ferry, such person, so offending, shall be fined not exceeding fifty dollars.*

Violating license laws.

SEC. 25. Every person who shall by himself or agent, transact any business, or do any act, without a license therefor, when such license is required by any law of this State, shall be fined not exceeding two hundred dollars, and in all such cases where the principal may be prosecuted, his agent may be compelled to testify, and when the agent is prosecuted, the principal may be compelled to testify.†

* See R. S. vol. 1, title "Ferries," p. 295.

† See title "License," R. S. vol. 1, p. 386.

The statute imposing a fine upon any person who shall, without having a license as required by law, vend any foreign merchandise within this State, is not in violation of the constitution of the United States.—*Beall* vs. *The State*, 4 Blackf. 107.

An indictment for retailing spirituous liquors to divers persons without license, is bad. It should either contain the names of the persons to whom the sale was made, or state their names to be unknown.—*The State* vs. *Stuckey*, 2 Blackf. 289.

An indictment for retailing spirituous liquors, need not show the kind of liquor sold. *The State* vs. *Græter*, 6 Blackf. 105. See the same case as to the averments in an indictment for retailing, within the borough of Vincennes, without license by the president and trustees, &c.

It is not necessary, in an indictment for selling liquors without license, to state that the defendant had not a permit from the clerk of the board of county commissioners to sell, &c.—*The State* vs. *Watson*, 5 Blackf. 155.

Indictment for retailing spirituous liquors without license. The liquor charged to have been sold by the defendant was sold by his wife. Held, that the wife, committing the offense without the presence or coercion of her husband, was alone responsible.—*Pennybaker* vs. *The State*, 2 Blackf. 484. See *Hipp* vs. *The State*, 5 Blackf. 149.

A grocer, having a license to retail spirituous liquors, sold his grocery, agreeing that the buyer should have the benefit of the license. Held, that the license was not assignable, and that the buyer had no authority under it to retail spirituous liquors.—*Godfrey* vs. *The State*, 5 Blackf. 151.

Port wine is not a spirituous liquor, within the meaning of the statute.—*The State* vs. *Moore*, 5 Blackf. 118.

Indictment in the Wayne circuit court, for retailing spirituous liquors without license, on the 1st of September, 1844. Held, that the circumstance that the sale was made in the city of Richmond, in Wayne county, was no defense.—*Sloan* vs. *The State*, 8 Blackf. 361.

Retailing spirituous liquors without a license from the city of New Albany, is not an offense against the State.—*Bogart* vs. *The city of New Albany*, 1 Carter's Ind. Rep. 38.

The defendant kept whiskey for sale by the quart, (having no license to retail,) and a person was in the habit of going with a pint bottle to the defendant's shop

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Misdemeanors—selling liquor to minor, &c.—adulterating liquors—gaming.

Selling liquor to minor, or person intoxicated.

SEC. 26. If any person, by himself or agent, shall sell or give any intoxicating liquor to any minor, without the consent of his parent or guardian, or shall sell or give any intoxicating liquor to any person, at the time in a state of intoxication, he shall be fined not less than five, nor more than fifty dollars, and in such prosecution, when the principal is defendant, the agent may be compelled to testify, or when the agent is prosecuted, the principal may be compelled to testify.*

Adulterating liquors.

SEC. 27. Any person who shall adulterate any wine, spirits or other intoxicating liquors which are intended for sale by the admixture of any deleterious or other substance or fluid therewith, and any person who shall sell or offer for sale any wine, spirits, or other intoxicating liquors which shall have been so adulterated as aforesaid, shall on conviction thereof be fined in any sum not less than five nor more than fifty dollars.

Gaming.

SEC. 28. Every person who shall, by playing or betting at or upon any game or wager, either lose or win any article of value, shall be fined not exceeding fifty dollars, and any one of the persons so betting or playing may be compelled to testify against the others therein concerned.†

for whiskey. He contracted for a quart, but took only a pint at a time, and when he had used that up, he would go back for the other pint. Held, that this was a sale for only a pint, and the defendant was guilty of retailing without license.—*Murphy* vs. *The State*, 1 Carter's Ind. Rep. 366.

In conformity with an act of 1846, a vote was taken in Centre Township, Marion county, relative to the granting of licenses to retail spirituous liquors in that township, and the voters determined, by a large majority, against granting such licenses. The county commissioners were duly notified of the vote. Held, that the retailing of spirituous liquors afterwards in said township, without license, was, under the act of 1843, an indictable offense.—*Garner* vs. *The State*, 8 Blackf. 568.

* An inn-keeper is not liable to be indicted for the offense, committed in his absence and without his knowledge, by his barkeeper, of selling spirituous liquor to an intoxicated person. A master, as a general rule, is not subject to punishment by indictment for the offenses of his servant, unless they were committed by his command, or with his assent.—*Hipp* vs. *The State*, 5 Blackf. 149.

† See ante, R. S. vol. 2, p. 372.

An indictment for gaming need not state the name of the game played, nor the name of the person with whom the bet was made, his name being alleged to be unknown.—*The State* vs. *Maxwell*, 5 Blackf. 230. See *The State* vs. *Bougher*, 3 Blackf. 307.

An indictment for unlawfully winning of several persons (naming them) and others, a certain quantity of beef, &c., was held bad for not naming all the persons with whom the bet was made, or stating that the names not given were unknown.—*The State* vs. *Irvin*, 5 Blackf. 343.

An indictment for betting on the result of an election must state for what purpose the election bet on was held; that is, whether it was for president of the United States, for governor of the state, &c.—*Bellair* vs. *The State*, 6 Blackf. 104.

An indictment charging the defendant with winning the sum of five dollars by

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Keeping gaming house.

SEC. 29. If any person shall keep, or suffer his or her building, arbor, booth, shed, or tenement, to be used for gaming, or if any person being the owner of any building, arbor, booth, shed or tenement, shall rent the same to be used for gaming, he shall be fined not less than fifty, nor more than five hundred dollars; and every person who may have been engaged in gaming in any such place, either by betting or otherwise, may be compelled to testify against the defendant as to all the facts, in any prosecution under this section.*

Evidence that house was rented for gaming.

SEC. 30. And it shall be sufficient evidence that any such building, arbor, booth, shed or tenement, specified in the last preceding section, was rented for the purpose of gaming, if such gaming actually was carried on, and the onwer or lessor thereof knew, or had good reason to believe that the lessee suffered any gaming therein, and such owner or lessor, took no sufficient means to prevent or restrain the same.

Horse-racing on highway.

SEC. 31. Any person who shall knowingly suffer his horse to be run in a "horse-race," along any public highway in this State, and any person who shall act as rider in any such race on being convicted, shall be fined not less than five nor more than fifty dollars, and upon the trial of any such offense, it shall be sufficient to prove that the animal run, was a horse, mare, or gelding, and any one so concerned in such race, may be compelled to testify thereof against the others.†

a wager, &c., is not sustained by proof that he won a promissory note for five dollars of the person with whom he bet.—*Tate* vs. *The State*, 5 Blackf. 174.

When an indictment for gaming charges the defendant with winning or losing with several persons, &c., proof that the winning or losing was with a part of those persons is not sufficient.—*Isely* vs. *The State*, 8 Blackf. 403.

An indictment for gaming may be sustained against the person who made the bet, though another person furnished the money.—*Ibid.*

A horse-race is a game, and is, therefore, within the statute enacting that any person legally called to give evidence against another for gaming, shall be deemed a competent witness to prove such gaming, although such person may have been concerned as a party, and may be compelled to testify.—*Cheesum* vs. *The State*, 8 Blackf. 332.

The name of the game need not be stated.—*Webster* vs. *The State*, 8 Blackf. 400.

* Whether the circumstance of a defendant's permitting a roulette to be gambled upon once in his house, is sufficient evidence to support an indictment against him for keeping a room for gambling, is a proper question for the jury.—*Armstrong* vs. *The State*, 4 Blackf. 247.

In such an indictment the names of the persons who played should be given, or their names alleged to be unknown.—*Ball* vs. *The State*, 7 Blackf. 242.

†The *termini* of a road need not be stated in an indictment for running a "horse-race" in a highway.—1 Carter's Ind. Rep., 479 and 532.

The indictment charged that the defendant acted as "rider in a certain horse-race which was then and there run along and upon a public highway in said county between animals of the horse kind in a trial of speed. Held, that the charge was too loose and vague.—*Myers* vs. *The State*, 1 Carter's Ind. Rep. 251.

It is an offense for a person to permit his horse to be run in a horse-race. It is a separate offense for a person to act as rider in such race.—*State* vs. *Ness*, 1 Carter's Ind. Rep. 64.

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Misdemeanors—lottery—monument of boundaries—setting grounds on fire, &c.

Lottery.

SEC. 32. If any person shall sell any lottery tickets, or share in any lottery, or scheme for the division of property to be determined by chance, or shall make or draw any lottery, or scheme for a division of property, not authorized by law, such person, on conviction shall be fined not exceeding five hundred dollars.

Removing monument on boundary of land.

SEC. 33. If any person shall mischeviously remove any monument erected for the purpose of designating the corner or any other point in the boundary of any tract of land, or shall maliciously or mischeviously deface or alter the mark upon any monument, made for the purpose of designating any point, course or line in the boundary of any tract of land, or shall wilfully cut down or remove any monument upon which such mark shall be made, with the intent to destroy such mark, such person shall be punished by imprisonment in the county jail not exceeding six months, or by fine not exceeding two hundred dollars.

Setting grounds on fire.

SEC. 34. If any person shall wilfully and maliciously set on fire, or cause to be set on fire, any grounds within this State, not belonging to such person, or shall intentionally permit the fire to pass from grounds owned by such person, to the injury of any other person, the person so offending shall be fined not exceeding fifty dollars.

Bringing pauper into the State.

SEC. 35. Every person who shall knowingly bring within this State a pauper with the intention of making him or her a charge upon any of the counties in this State, shall upon conviction be fined five hundred dollars.

Attempting to procure abortion.

SEC. 36. Every person who shall wilfully administer to any pregnant woman, or to any woman whom he supposes to be pregnant, anything whatever, or shall employ any means with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be punished by imprisonment in the county jail not exceeding twelve months, and be fined not exceeding five hundred dollars.*

Disturbing religious meeting.

SEC. 37. If any person shall disturb any religious society or any member thereof, when met or meeting together for public worship, or shall sell or give away any spirituous liquor at any booth, wagon, shed, or open place, or in any building temporarily erected for the purpose of selling therein such liquors within two miles of any collection of a portion of the citizens of this State, convened for the purpose of worship, or shall disturb any collection of the people convened for any lawful purpose, such person shall be fined not exceeding fifty

* In an indictment for administering medicine to procure abortion, the name of the medicine need not be stated, nor need it be described as noxious.—*The State* vs. *Vawter*, 7 Blackf. 592.

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nor less than five dollars, and imprisonment not exceeding thirty days may be added.*

Removing dead body.

SEC. 38. Every person who shall, without the consent of the near relatives of a deceased person, or without the consent of such deceased person being had in his or her lifetime, or the direction of the coroner, remove the dead body of such deceased person, or any part thereof, from interment in any public or private burying ground, shall be fined not exceeding one thousand dollars.†

Counselling marriage between colored and white persons.

SEC. 39. Every person who shall knowingly counsel, or assist in any manner, in any marriage between any person having one eighth part or more of negro blood, and any white person, shall be fined not less than one hundred, nor more than one thousand dollars.

Sale and conveyance to defraud creditor or purchaser.

SEC. 40. Every person who shall be a party to the sale and delivery of any goods or chattels, or any conveyance or assignment of any interest in land, or any profits issuing therefrom, or of any goods, chattels, or things in action, made to defraud purchasers, or to hinder, delay, or defraud creditors, and every person being privy to or knowing of such sale or conveyance, who shall willingly put the same in use, as having been made in good faith, shall, upon conviction, be imprisoned in the county jail not exceeding twelve months, and be fined not exceeding two hundred dollars.

Discovery of fraud in civil, not evidence in criminal proceeding.

SEC. 41. The discovery of any fraud specified in the last preceding section, under oath, in any civil suit by any person, shall not be evidence against such person in any criminal prosecution under the last preceding section.

Obstructing process—freeing person arrested.

SEC. 42. Every person who shall obstruct the execution of any legal process, or who shall forcibly free any person from legal arrest, knowing such person to be under arrest,

* An indictment for disturbing a religious society, &c., may charge the defendant, in the same count, with disturbing the society and its members. Such indictment need not state the name of the society.—*The State* vs. *Ringer*, 6 Blackf. 109.

† The indictment for a disinterment of a corpse need not allege the disinterment to be unlawful.—*The State* vs. *McClure*, 4 Blackf. 328.

A person without being actually present at the unlawful disinterment of a dead body, may be found guilty of the offense, if, with the intention of giving assistance, &c., he be near enough to afford it, should it be needed. Testimony tending to prove the defendant's co-operation, &c., should be referred to the jury.—*Tate* vs. *The State*, 6 Blackf. 110.

Such offense consists not merely in the removal of the dead body, but in its removal without the consent of the deceased given in his lifetime, or of his near relatives given since his death.—*Ibid.*

An indictment in such case, charging the defendant with removing from its grave a certain deceased child of N. H. Burke, "that had yet no name given to it," without the consent, &c., is sufficient—*Ibid.*

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shall be fined not exceeding ten thousand dollars, or be imprisoned not exceeding six months.*

Negligently suffering prisoner to escape.

SEC. 43. If any officer, whose duty it may be to have the custody of prisoners, charged with or convicted of any offense against any law of this State, shall negligently suffer any such prisoner to escape out of his custody, he shall be fined not exceeding ten thousand dollars.

to escape.

SEC. 44. Every person who shall aid any prisoner, lawfully committed to any place of confinement, in an attempt to escape therefrom, or who shall convey into such place of confinement anything, with intent to facilitate the escape of such prisoner, shall be punished by imprisonment in the county jail not exceeding twelve months, or be fined not exceeding five hundred dollars, or by both such fine and imprisonment.

Failing to assist in service of process when required.

SEC. 45. Every person required by any sheriff or his deputy, or by any coroner, constable, or any conservator of the peace, to assist him in the execution of his office, or in the service of any process, and failing to obey, shall, upon conviction, be fined in any sum not exceeding one hundred dollars, unless he show a valid cause for not obeying.†

*An indictment for obstructing the execution of a search warrant, must show the warrant to be legal; and it must therefore show that the warrant appeared upon its face to be founded on a sufficient affidavit.—*The State* vs. *Tuell*, 6 Blackf. 344.

It should be observed that a party will not be guilty of this offense of obstructing an officer, or the process which such officer may be about to execute, unless the arrest is lawful.

If a man without authority attempt to arrest another illegally, it is a breach of the peace; and any other person may lawfully interfere to prevent it, doing no more than is necessary for that purpose. 5 East. 304.

But where the process is regular, and executed by the proper officer, it will not be competent even for a peace officer to obstruct him, on the ground that the execution of it is attended with an affray and a disturbance of the peace; for it is an established principle that if one having a sufficient authority, issue a lawful command, it is not in the power of any other, having equal authority in the same respect, to issue a contrary command; as that would be to legalize confusion and disorder. 1 East. P. C., ch. 5, sec. 71, page 304.

Some sheriff's officers having apprehended a man by virtue of a writ against him, a mob collected, and endeavored by violence to rescue the prisoner. In the course of the scuffle, which was at ten o'clock at night, one of the bailiffs having been violently assaulted, struck one of the assailants, a woman, and it was thought for some time that he had killed her; whereupon, and before her recovery, the constable was sent for, and charged with the custody of the bailiff, who had struck the woman. The bailiff, on the other hand, gave notice of their authority, and represented the violence which had been previously offered to them; notwithstanding which the constable proceeded to take them into custody upon the charge of murder, and at first offered to take care also of their prisoner; but their prisoner was soon rescued from them by the surrounding mob. The next morning, the woman having recovered, the bailiffs were released by the constable. Upon these facts Heath, J., was clearly of opinion that the constable and his assistants were guilty of the assault and rescue, and directed the jury accordingly. Anon. Exeter Sum. Ass. 1793; East. P. C., ch. 5, sec. 71, p. 305.

†The refusal, without a sufficient excuse, to assist a constable to prevent the escape of a person in his custody, is a misdemeanor. The indictment must show that the defendant was informed of the official character of the constable.—*The State* vs. *Deniston*, 6 Blackf, 277.

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Returning after removal from lands mortgaged to the State.

SEC. 46. If any person who shall have been removed, by a proper officer, from lands mortgaged to the State, and remaining delinquent, shall return to settle upon such land without the consent of the auditor of the county, such person shall be fined not exceeding one hundred dollars, and be imprisoned not exceeding thirty days.

Obstructing habeas corpus.

SEC. 47. Any one having under his restraint any person for whose relief a writ of *habeas corpus* shall have been duly issued, who, with intent to elude the service of such writ, or to avoid the effect thereof, shall transfer such person to the custody or control of another, or shall conceal or change the place of his or her confinement or restraint, or shall remove him or her without the jurisdiction of the court from which the writ is issued or sought to be issued, shall be deemed guilty of a misdemeanor.

Aiding in the same.

SEC. 48. Every person who shall knowingly aid in the commission of any offense specified in the last preceding section, shall be deemed guilty of a misdemeanor.

Penalty.

SEC. 49. Every person convicted of any offense under the provisions of the last two preceding sections, shall be fined not exceeding one thousand dollars, to which may be added imprisonment in the county jail not exceeding ninety days.

Violation of estray laws.

SEC. 50. If the taker up of estray property, shall suffer the same to be taken out of the county for more than three days at a time, or shall convert the same to his own use before the title thereto shall vest in him according to law, or, if he or any officer shall knowingly and wilfully violate any of the provisions of the law regulating the taking up of estrays, such person or such officer shall be fined not exceeding one hundred dollars or imprisoned not exceeding six months.*

Usury.

SEC. 51. Any person who shall directly or indirectly, bargain for, receive or reserve, on any contract or agreement whatever, a greater rate of interest than at the time is allowed by law, shall be fined in five times the interest so unlawfully bargained for, taken or reserved, and in any prosecution under this section, it shall not be necessary to set forth the contract or instrument by which such interest may have been bargained for, received or reserved.†

* An indictment charging a person who has taken up an estray, with not complying with the provisions of the statute on the subject, must state the particular acts which the defendant has omitted to perform.—*Dixon* vs. *The State*, 4 Blackf. 312.

† A contract made usurious by mistake, and not with a corrupt intention, is not within the statute against usury.—*Sutton et al.* vs. *Fletcher*, 6 Blackf. 362.

See Revised Statutes, Vol. 1, title "Interest," p. 343.

An indictment for usury, under the statute of 1833, charged that the defendant, on, &c., at, &c., received from one A. B. the sum of $176 for the loan, use, forbearance and giving day of payment, of the sum of $200, lent and advanced by the defendant to the said A. B. from the 20th of December, 1834, until the 9th of June, 1836; which sum of $176 so received, &c., exceeds the rate of $10 for the

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Misdemeanors—obscene books—marriage certificate—violating election laws.

Uttering obscene books.

SEC. 52. Every person who shall by himself or agent, print, vend, exhibit or circulate any obscene book, pamphlet, print or picture, shall upon conviction, be fined not exceeding five hundred dollars, and if the exhibition be made to a female, imprisonment not exceeding three months may be added.

Same.

SEC. 53. All persons engaged in vending, circulating or exhibiting or in any way preparing such obscene book, pamphlet, print or picture, shall be deemed, and punished as principals.

Failing to return marriage certificate and license.

SEC. 54. Any person having solemnized a marriage, who shall fail to return a certificate thereof, with the license therefor, within the time prescribed by law, shall be fined not less than five nor more than one hundred dollars.*

Furnishing false ticket.

SEC. 55. If any person shall furnish an elector who cannot read the English language, at any election, held pursuant to law, with a ticket which such person shall represent to such elector, as containing a name different from the one printed or written thereon, such person shall be fined not less than ten, nor more than one hundred dollars.

Fraudulently causing false vote.

SEC. 56. If any person shall fraudulently cause, or attempt to cause any elector, at any election held pursuant to law in this State, to vote for a person different from the one he

forbearance for one year a large sum, viz., &c. Held, that this description of the offense was sufficient.—*The State* vs. *Deputy*, 5 Blackf. 91.

A person, through his agent, borrowed of the defendant 550 dollars, payable in one year. The defendant handed the agent 550 dollars, but immediately received the 50 dollars again from the agent as interest. Held, that the contract was usurious.—*Wilkerson* vs. *The State*, 2 Carter's Ind. Rep. 546.

The penalty for taking excessive usury is not incurred, unless the lender in fact corruptly receive the usurious interest, although he has received security for the payment of the money loaned, with usurious interest.—7 Mass. Rep. 261 ; 10 *Ibid*. 121.

But if, at the time of making the loan, the borrower advance a sum of money exceeding the lawful interest, by way of compensation for forbearance, the offense of usury is from that time committed, and the lender will be liable to the penalty, whether the principal sum be ever paid or not.—5 Mass. Rep. 53.

Upon a prosecution to recover the penalty for taking excessive usury, it will be no excuse for the defendant that he acted as agent for another person, especially if he professed, at the time, to act on his own account, and not as agent. —*Ibid*.

Where a partial payment has been made on account of a note for a sum of money borrowed on usurious interest, it was held that the usury was complete. —1 Dall. 216.

A fair purchase may be made of a bond or note, even at 20 or 30 per cent. discount, without incurring the penalties of usury.—*Ibid*.

* Indictment against a magistrate, under the statute of 1838, for not filing in the clerk's office, in due time, a certificate of the solemnization of a marriage. The indictment showed that three months and fourteen days had elapsed from the time of the marriage to the filing of the certificate. Held, that the indictment could not be sustained.—*Kent* vs. *The State*, 8 Blackf. 163.

An averment as to a license having issued was unnecessary, and should be rejected as surplusage.—*The State* vs. *Wilder*, 7 Blackf. 582. Same point decided in case of *The State* vs. *McWhinney*, 5 Blackf. 364.

For the necessary averments in the indictment, see *The State* vs. *Cain*, 6 Blackf. 422.

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intended to vote for, such person shall be fined not less than ten, nor more than one hundred dollars.

Attempting to vote twice.

SEC. 57. If any elector shall vote or attempt to vote more than once at any election, or shall knowingly hand in two or more tickets together, or having voted in one township, precinct or county, shall afterwards on the same day vote, or attempt to vote in another township, precinct or county, such person shall be fined not exceeding fifty dollars, and be incapable of voting at any election or holding any office for two years thereafter.

Penalty of judge of election for attempt to influence elector.

SEC. 58. If any inspector, judge or clerk of an election, shall attempt to induce by persuasion, menace or reward or promise thereof, any elector to vote for any person, the person so offending shall be fined not exceeding one hundred dollars.

Illegal vote.

SEC. 59. Any person, not having the legal qualifications of a voter at any election authorized by law, to be held in this State, for any officer whatever, who shall vote or offer to vote at such election, shall be fined not less than five, nor more than one hundred dollars.

Penalty of officer of election for opening ticket.

SEC. 60. If any judge, inspector, clerk or other officer of an election, shall open or mark by folding or otherwise, any ticket presented by such elector at such election, or attempt to find out the names thereon, or suffer the same to be done by any other person, before such ticket is deposited in the ballot box, he shall be fined in any sum not exceeding one hundred dollars.

Offering threat or reward to procure election.

SEC. 61. If any person shall use any threats, menaces, force, or any corrupt means, at or previous to any election held pursuant to the laws of this State, towards any elector to hinder or deter such elector from voting at such election, or shall directly or indirectly offer any bribe or reward of any kind, to induce any elector to vote contrary to his inclinations, or shall on the day of the election, give any public treat, or authorize any other person to do so, to obtain votes for any person, the person so offending shall be fined not exceeding five hundred dollars, and be incapable of holding any office for two years after conviction thereof.

Performing duty of office before qualifying.

SEC. 62. If any person elected or appointed to an office, or his deputy, shall perform any of the duties of such office, without having taken and subscribed the oath prescribed by law, or before having given and filed the bond required of him, and in the manner prescribed by law, he shall be fined not exceeding one thousand dollars.

Officer claiming what is not due, or failing in duty.

SEC. 63. If any officer of this State, by color of his office, shall demand or receive any thing of value, which may not be due him; or shall fail to perform any duty within the time and in

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the manner prescribed by law; or if any member of the board of commissioners of any county, shall so fail to perform any duty in the manner and within the time prescribed by law, such person shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months.*

Auditor, &c., keeping office in other building than that provided by board.

SEC. 64. Any auditor, clerk or recorder of a county, who shall without the consent of the board of commissioners of the county, keep his office, and the books and papers belonging thereto, in any building other than that provided by

* Indictment against the clerk of the county of Warrick for extortion. Held, that the county was a body politic, and may be the owner of money, and if money be extorted from its officers, the indictment may allege that the money was obtained from the county.—*The State* vs. *Moore*, 1 Carter's Ind. Rep. 548.

An indictment against a county assessor for not calling on a person, resident in the county, for a list of his taxable property, need not allege that such person had such property.

But an indictment for not listing the taxable property of such person, though it be in the language of the statute, should allege that such person had taxable property. An averment that he was subject to taxation is not sufficient.—*The State* vs. *Hunter*, 8 Blackf. 212.

If an indictment under the act of 1842, applying certain funds to the purposes of education, be against a justice of the peace for not paying over fees, &c., on the first Monday of August of a certain year, it must aver that the fees were received by him prior to the first Monday of August of the preceding year.—*The State* vs. *Boyles*, 7 Blackf. 90.

An indictment charged that the defendant as constable, travelled four miles to serve an execution, for which he was entitled, as mileage, to sixteen cents; that, corruptly, &c. he extorted thirty-two cents for said mileage. Held, that the indictment was sufficient.—*Emory* vs. *The State*, 6 Blackf. 106.

An indictment against a constable for extortion, charging him with having collected more than was due him on execution, should set out the recital in the execution, showing judgment on which the execution issued; and the names of both parties to the execution should be alleged.—*Seany* vs. *The State*, 6 Blackf. 403.

An indictment against a school commissioner for failing to make a report to the county auditor of the moneys received and disbursed by him, &c. should contain an averment that the money had been received by the defendant, which he was bound to report.—*Lathrop* vs. *The State*, 6 Blackf. 502.

An indictment against a justice of the peace found at the March term, 1840, charged that the defendant had in his hands, on the first day of January, 1840, a certain sum of money received by him as a fine, &c., for seminary purposes; and that he had failed to pay the money over, &c. within sixty days after the receipt thereof. Held, that the description of the offense was unobjectionable; and that its commission within the time prescribed by statute was shown with sufficient certainty.—*The State* vs. *Noel*, 5 Blackf. 548.

An indictment against a constable for official negligence in not executing a State warrant, need not contain an averment that the justice who issued the warrant had legal authority to do so; nor an allegation, that previously to the issuing of the warrant, a complaint on oath was made to the justice, charging the person to be arrested, with the commission of a crime; nor that a crime was committed in view of the justice.—*Stewart* vs. *The State*, 4 Blackf. 171.

It is sufficient if the indictment in such case set out a warrant legal on its face. *Ibid.* The State is a "person" within the meaning of the statute, and an averment that the offense was to the injury of the State is sufficient.—*Ibid.*

In an indictment for extortion where nothing was due, there must be an averment that nothing was due; and if the charge be for taking more than was due, the indictment must show what was due.—*The State* vs. *Coggswell*, 3 Blackf. 54.

An indictment against a constable for failing to return an execution must state the substance, at least, of the execution.—*The State* vs. *Smith*, 5 Blackf. 327.

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such board for that purpose, shall be fined not exceeding one hundred dollars.

County officer purchasing demand against county.

SEC. 65. Any auditor, treasurer, clerk, sheriff, or member of the board of commissioners of a county, who shall purchase or receive in payment, any demand against such county, for less than the face of such demand, shall be fined not exceeding five hundred dollars.

Obstructing highways,

SEC. 66. Every person who shall in any manner obstruct any public highway, railroad, towpath, canal, turnpike, plank or coal road, or injure any toll or other bridge, or toll gate, culvert, embankment, or lock, or make any breach in any canal, or injure any material used in the construction of such roads and canal, such person, and all other persons aiding and abetting therein, shall be fined not exceeding five hundred dollars, or imprisoned not exceeding three months; and upon prosecution for obstructing a highway, it shall be sufficient to prove that it is used and worked as such.*

*The making a fence across a public highway, is a misdemeanor.—2 Carter's Ind. Rep. 440.

There is no doubt but that all injuries whatever to a highway, as by digging a ditch, or making a hedge across it, or laying logs of timber in it, or by doing any other act which will render it less commodious, are public nuisances at common law.—1 Hawk. P. C. ch. 76, sec. 144.

It is a nuisance to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; and it is said that the owner of trees hanging over a highway, to the annoyance of travellers, is bound by the common law to lop them; and that any other person may lop them so far as to avoid the nuisance.—3 Bac. Abr., Highway, (E); 1 Hawk., P. C., ch. 76, secs. 5, 8, 147.

When a wagoner occupied one side of a public street in the city of Exeter, before his warehouses, in loading and unloading his wagons, for several hours at a time, both day and night, and had one wagon at least usually standing before his warehouses, so that no carriage could pass on that side of the street, and sometimes even foot-passengers were incommoded by cumbrous goods lying on the ground on the same side, ready for loading, he was held to be indictable for a public nuisance; although it appeared that sufficient space was left for two carriages to have passed on the opposite side of the street.—6 East, 427.

Upon the same principle it has been held to be an indictable offense for stage coaches to stand plying for passengers in the public street; and Lord Ellenborough, C. J., said, "A stage coach may set down or take up passengers in the street, this being necessary for public convenience; but it must be done in a reasonable time; and private premises must be procured for the coach to stop in during the interval between the end of one journey, and the commencement of another.—3 Campb. 224.

Laying logs of timber in the highway has been already stated as one of the clear instances of nuisance, (3 Campb. 224.) And the party will not be excused by showing that he laid them only here and there, so that the people might have a passage through them by windings and turnings.—2 Roll. Abr. 137; 1 Hawk. P. C. ch. 76, sec. 145.

From a recent case it appears also that an obstruction to a public highway will not be excused on the plea of its being necessary for the carrying on of the party's business, though such obstruction be only occasional. It was proved that the defendant, who was a timber merchant, occupied a small timber-yard close to a street, and that from the narrowness of the street and the construction of his own premises he had in several instances, necessarily deposited long sticks of timber in the street, and had them sawed into shorter pieces there before they could be carried into his yard; and it was contended on his behalf that he had a right so to do,

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Misdemeanors—violating canal laws—neglect of supervisor.

Shutting culverts, water gate, interfering with weir, &c.

SEC. 67. If any person shall unnecessarily open or cause to be opened and shut any lock, paddle, culvert, or water gate, or drive any spike, nail, pin or wedge, into any of said gates, or in any manner interfere with the free use thereof, or shall place upon or take from the tumble, or regulating weir of any lock, any device placed there to increase or diminish the flow of water over such tumble or weir, such person upon conviction, shall be fined not exceeding five hundred dollars, or imprisoned not exceeding three months.

Leading animal upon and obstructing towpath.

SEC. 68. Every person who shall lead or drive any animal drawing after it any vehicle upon the towing path or berme-bank of any canal, or place thereon any thing to obstruct the navigation thereof, upon conviction shall be fined not exceeding fifty dollars.

Supervisor failing in duty.

SEC. 69. If any supervisor of roads fail to keep his highways and bridges in his road district in as good repair as the available labor or other means of such district will enable him to do, or fail to discharge any other duty required of him by law, he shall be fined not less than five, nor more than one hundred dollars, and upon a prosecution for neglecting to keep a highway in good repair, it shall be sufficient to prove that such highway is commonly reputed as such.*

as it was necessary to the carrying on of his business; and that it could not occasion more inconvenience to the public than draymen taking hogsheads of beer from their drays, and letting them down into the cellar of a publican. But Lord Ellenborough, C. J., said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or a wagon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house, the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance."

In books of the best authority a river common to all men is called a highway.—1 Hawk. P. C. ch. 76, sec. 1.

It is a common nuisance to divert part of a public navigable river, whereby the current of it is weakened and made unable to carry vessels of the same burthen as it could before, (1 Hawk. P. C., ch. 75, sec. 11.) And the laying timber in a public river is as much a nuisance, where the soil belongs to the party, as if it were not his, if, thereby, the passage of vessels is obstructed.—5 Bac. Abr. Nuis. (A).

*An indictment against a supervisor of a highway for "neglecting to keep the roads in his district in repair," must describe the particular roads or parts thereof which were suffered to be put out of repair.—*The State* vs. *McMurrin*, 1 Carter's Ind. Rep. 44.

An indictment against a supervisor for not keeping a road in repair, need not aver that he did not keep it in as good repair as the available labor or means enabled him to do.—*The State* vs. *Brown*, 8 Blackf. 69.

Such averment is substantially contained in an indictment alleging the road to be so obstructed by trees, &c., as to be nearly impassable, &c.—*Ibid.*

An indictment charged that the defendant was supervisor of the highways in road-district No. 1, in the township, &c., county, &c.; that he wilfully suffered that part of the road running from S. in said county, in the direction of G. in said county, situate in said road-district, to be obstructed, &c. Held, that the description of the road was sufficient.—*The State* vs. *Harsh*, 6 Blackf. 346.

The *termini* of the road need not be stated.—*Ibid.*

The indictment is not objectionable for not alleging that the road had been estab

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False bill of lading.

SEC. 70. Every person who shall knowingly sign or deliver a false bill of lading, shall be fined not exceeding five hundred dollars.

Desecrating cemetery.

SEC. 71. If any person shall wilfully disfigure or injure any tombstone, monument, fence, tree or shrubbery around or within any cemetery or shall use such cemetery for any other purpose than a burying-ground, he shall be fined not exceeding five hundred dollars, or imprisoned not exceeding six months.

Disclosing telegraphic dispatch.

SEC. 72. If any operator, clerk, servant or messenger of any telegraph company, shall disclose the contents of any dispatch or message received or sent from any office of such company, except to a court of justice, or to a person authorized to know the same, he shall be fined not exceeding five hundred dollars.

Changing inspector's brand.

SEC. 73. If any person shall alter or erase any brand or mark of any inspector appointed by the proper authority placed on any barrel of salt, flour, beef, pork or hogshead of tobacco, or other article authorized by law to be inspected and branded, he shall be fined not exceeding one hundred dollars.

Keeping gaming tables, &c.

SEC. 74. Every person who shall be the keeper or exhibitor of any gaming table, roulette, shuffle board, faro bank, nine pin or ten pin alley, or billiard table, for the purpose of wagering any article of value thereon, shall be fined not exceeding one thousand dollars, to which may be added imprisonment not exceeding six months.*

Recording deed without indorsement of auditor.

SEC. 75. If any county recorder shall record any deed of conveyance without having the certificate of transfer indorsed thereon, by the proper auditor, he shall be fined five dollars.

Carrying off products of the soil.

SEC. 76. If any person shall pull off and carry away any corn growing on the stalk, or any fruit on the tree, pumpkins or melons on the vine or any other annual product attached to the realty or growing in the soil of the value of ten cents or upwards, he shall be fined not exceeding fifty dollars, and may be imprisoned not exceeding six months, and any person concerned in the commission of any such offense shall be compelled to testify against the others.

Failing to give sworn list of taxable property.

SEC. 77. If any person when requested by the assessor, or any of his deputies, fail to give a true list of all his taxable property, or to take and subscribe any oath in that behalf, as required by law, or shall fix a fraudulent value where an oath

lished by law, or for omitting to aver that the county commissioners had allotted hands to the defendant, &c. Held, also, that if through the default of the commissioners, &c., the defendant could not keep the road in repair, he might avail himself in defense under the general issue.—*Tate* vs. *The State*, 5 Blackf. 73.

*Under the statute of 1838, the keeper of a billiard table, though he do not play on it himself for money, nor suffer others, yet if, for a stipulated compensation per game, he allow any persons to use it, he is liable to an indictment.—*Blanton* vs. *The State*, 5 Blackf. 560.

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is not required on such property, such person upon conviction, shall be fined not exceeding five hundred dollars.

Obstructing ingress of fish

SEC. 78. Any person who shall by stretching any net across any creek emptying into the Ohio river within one mile of the mouth thereof, to prevent the ingress or egress of fish from and to such river, shall for every day such obstruction is continued, be fined not less than five nor more than twenty dollars.

Poisoning fish.

SEC. 79. Any person who shall throw any coculus indicus or fish berries in any water for the purpose of poisoning fish, shall be fined not less than five, nor more than twenty dollars.

Permitting horses with glanders to run at large.

SEC. 80. Any person who shall knowingly permit any horse, mare or gelding, affected with the glanders, to be taken from his or her premises, or to run at large, shall be fined not exceeding fifty dollars.

Testimony, when to be used against person giving it.

SEC. 81. Whenever any person is required to testify touching the commission of any offense in this act provided, his evidence therein shall not afterwards be used in any prosecution against him, except in case of perjury committed by him therein.

CHAPTER 7.

AN ACT concerning Fugitives from Justice.

[APPROVED MAY 27, 1852.]

Proceedings to arrest a fugitive from justice, trial thereupon, and constable's fees therefor.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That if any person having committed a crime in one county, shall flee to another, any judge of the supreme court, or circuit court, or court of common pleas, or any justice of the peace within the county wherein said fugitive may be, shall, on the oath of any person charging such fugitive with such crime, (either directly, or on the belief of the affiant,) issue his warrant and cause such fugitive to be arrested and brought before him; and after evidence heard, if in the opinion of such judge or justice, the proof or presumption is strong as to the guilt of the person charged, such judge or justice shall issue his warrant to some constable, to convey such fugitive to the county in which he committed the offense charged against him, and deliver him to some judge of the circuit court, or court of common pleas, or justice in such county, together with the warrant of the judge or justice before whom the said fugitive was examined; and it shall be the duty of such judge or justice to whom such fugitive shall be delivered, to cause him to be committed to the custody of some constable or sheriff of the county for safe

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keeping; and to summon forthwith the person against whose person or property the said offense shall have been committed, or some witness thereto; and such judge or justice shall, on the examination, be governed in all respects as though said complaint had been made and affidavit taken before him in the first instance; and the constable who shall convey such fugitive from the county where he was first arrested, to the county in which the offense was committed, shall receive the same fees for such service as are by law allowed to sheriffs for like services, and subject to the same rules and conditions.*

*The following decisions, it will be perceived, refer only to fugitives fleeing from one State to another. They are collected here for convenient reference merely. See the 2d sec., 4th art. of the const. of the U. S.

Trespass for false imprisonment; plea, that the plaintiff was a fugitive from justice from Pennsylvania, where he stood charged with larceny, on affidavit, &c.; that *Joseph Ritner*, governor of that State, demanded him of *Noah Noble*, governor of Indiana, and produced and delivered to governor Noble, with the demand, a copy of the affidavit duly certified, &c.; that the latter accordingly caused the plaintiff to be arrested and delivered to the defendant, who was authorized by governor Ritner to receive him, &c.; that the defendant used no more force than was necessary to detain the plaintiff, &c., in order to take him to Pennsylvania, &c. Held, on general demurer, that the plea was good.—*Johnson* vs. *Vanamringe*, 5 Blackf. 311.

One Boggs made affidavit before a justice of Missouri, that on a day mentioned he was shot with intent to kill; and that he believed and had good reason to believe from information and evidence in his possession, that Joseph Smith, (the Mormon Prophet,) was accessory before the fact to the intended murder; and that said Smith was a resident and citizen of Illinois. Upon this affidavit, the Governor of Missouri made a requisition upon the Governor of Illinois for the delivery of said Smith to an agent authorized to receive him. The Governor of Illinois issued a writ to the sheriff of Sangamon county of Illinois for the apprehension of said Smith, and he was accordingly arrested. A writ of *habeas corpus* was sued out before the District Judge of the U. S. for the District of Illinois, by Smith.

The action being under a law of the U. S. a writ may issue.

The evidence did not show that any offense had been committed by Smith in Missouri.

On the contrary, it appeared that at the time of the alleged crime, the accused was in the State of Illinois.

The court decided in this case that the affidavit of Boggs should have stated distinctly that Smith had committed a crime, and that he had committed it in Missouri, and that it must have appeared that he had fled to Illinois. Smith being a resident of Illinois, though he might be an accessory before the fact to a crime committed in Missouri, if he remained in Illinois while he perpetrated the offense of being accessory, &c., he could not be claimed as a fugitive from Missouri. The laws of Illinois, and of Illinois only, could provide punishment in such case, and it was her duty to enact laws against the aiding and abetting, counselling and advising, by her citizens, the commission of a crime in a sister State.—3 McLean's Rep. 121.

In N. Y. a somewhat different principle prevails. In the case of *Adams* vs. *The People*, 1 Comstock's Rep. 173, it was held, that when an offense was committed within that State by means of an innocent agent, the employee is guilty as a principal, though he did not act in this State, and was, at the time the offense was committed, in another State.

That, in such case, the courts of N. Y. have jurisdiction of the offense; and if the offender come within the limits of the State, they have also jurisdiction of his person, and he may be arrested and brought to trial.

Where an offense is committed within this State, whether the offender be at the time within the State, or be without the State and perpetrates the crime by means of an innocent agent, it is no answer to an indictment that the offender owes allegiance to another State or sovereignty.—1 Coms. N. Y. Rep. 173.

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PART FOURTH.

CONCERNING JUSTICES OF THE PEACE, THEIR GENERAL JURISDICTION, AND MODE OF PROCEEDING BEFORE THEM.

CHAPTER 1.

AN ACT providing for the election and qualification of Justices of the Peace, and defining their Jurisdiction, Powers, and Duties in Civil cases.

[APPROVED JUNE 9, 1852.]

Number of justices.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That the number of justices of the peace in each township shall be regulated by the board of county commissioners of the county, by proper orders of record; but the number shall not exceed three for each township, and one in addition thereto for each incorporated town therein, and authenticated copies of such orders shall be furnished by the auditor to the clerk of the circuit court.

SEC. 2. The reduction of such number shall not operate to remove any justice from office.

When there is a change of township limits.

SEC. 3. When by any change in the township of a county, a justice shall be brought within the limits of a township other than the one in which he was elected, he shall serve out his term in such township as one of the justices thereof.

Vacancies.

SEC. 4. Vacancies in the office of justice of the peace, shall be filled at the township election next preceding the time at which such vacancy will occur, or next after the creation of the office, and it shall be the duty of the clerk of the circuit court to notify in writing the clerk of the proper township at least thirty days previous to such election that such vacancy is to be filled, which notice shall authorize the board of judges of such township to hold said election and make legal return thereof.

Notice of election.

SEC. 5. It shall be the further duty of such clerk to issue his precept to the sheriff of the county directing him to give legal notice of such election, and such sheriff shall give twenty days' notice thereof, by posting up notices in at least three public places in such township, and delivering a copy thereof to the inspector of elections in such township.

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Certificate and commission.

SEC. 6. The board of judges or a majority of them in any such election, shall make out and sign a statement setting forth in words the number of votes given to each person at such election for such office, and seal and transmit the same by one of their own number to the clerk of the circuit court, on the Wednesday next after such election. And such clerk shall declare the proper number of persons, having the highest number of votes duly elected, and within ten days thereafter if there be no contest, certify such fact under the seal of his court to the Secretary of State, on which certificate the Governor shall issue commissions to the persons so elected.*

Resignation.

SEC. 7. The resignation of any justice of the peace shall be delivered to the clerk of the circuit court of the proper county.

Bond.

SEC. 8. The official bond of a justice of the peace shall be in such sum as may be required by the clerk of the circuit court, not less than one thousand nor more than five thousand dollars, and conditioned for the faithful discharge of the duties of his office, and the payment to the proper persons of all moneys that may come into his hands as such justice.†

* See R. S. vol. 1, p. 223.

† If a justice of the peace, in the discharge of any of his ministerial or judicial duties, act corruptly, to the injury of a party, his conduct is a breach of the condition of his official bond.—*The State* vs. *Flinn*, 3 Blackf. 72.

In case of a breach, by a justice of the peace, of the condition of his official bond, his death does not discharge the responsibility of his sureties. If the justice were, in such case, the sole obligor, or the surviving obligor, the action would survive against his executors or administrators.—*The State* vs. *Houston*, 4 Blackf. 291.

In a declaration against a justice of the peace and his sureties, on the official bond of the justice, it is not a sufficient assignment of a breach, to state generally that the justice had not faithfully discharged his duty; but the breach of some particular duty, of which breach the relator has a right to complain, must be set out.—*The State* vs. *Littlefield*, 4 Blackf. 129.

The sureties in such a case are not liable unless the act complained of was done corruptly, or with a knowledge that it was unlawful.—*Ibid.*

A justice of the peace rendered a judgment for A., the plaintiff, and B., the defendant, appealed. The justice failed to transmit the papers in time to the clerk's office, and the appeal was dismissed. B. sued the justice for his neglect. Held, that the declaration in such case should state that B. had a good defense to the whole or a part of A.'s demand.—*Crews* vs. *Sheets*, 4 Blackf. 275.

When a suit is brought to recover damages for the non-peformance of a duty of a justice of the peace, and there are exceptions contained in the enacting clause of the statute which prescribes the duty, the declaration must negative the exceptions.—*Weaver et al.* vs. *The State*, 8 Blackf. 563.

Debt on the bond of a justice of the peace. Breach assigned, that on the 21st of June, 1841, the relator recovered a judgment before the justice for 51 dollars and 25 cents against one E.; that the justice failed to issue execution on the judgment during his term of office, though he might, could, and should have issued it; that no execution issued on the judgment until the 6th of December, 1841, when one was issued by the successor of the justice, and when E. had no property subject to execution; and that the judgment had not been paid. Held, that the assignment of the breach was insufficient.—*Ibid.*

The declaration should have expressly averred, or have stated facts amounting to an averment, that the judgment had not been replevied, and that the judgment-creditor had not directed that an execution should not issue.—*Ibid.*

The statement that the justice might, could, and should have issued an execution, is only a conclusion of law.—*Ibid.*

In a suit on a justice's bond for neglecting to issue an execution, a plea that,

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Justice's court—jurisdiction.

Jurisdiction as to territory.

SEC. 9. The jurisdiction of justices in civil cases, shall, unless otherwise provided by law, be limited to their townships respectively.

Jurisdiction as to amount.

SEC. 10. Justices of the peace shall have jurisdiction to try and determine suits founded on contract or tort, when the debt or damages claimed or the value of the property sought to be recovered does not exceed one hundred dollars; but the defendant may confess judgment for any sum not exceeding two hundred dollars.*

at the time of the judgment and ever since, the execution-defendant was insolvent, is insufficient.—*Noel et al.* vs. *The State*, 6 Blackf. 523.

But in such suit, the execution-defendant's insolvency at the time of the judgment and afterwards, may be proved in mitigation of damages.—*Ibid.*

In a suit in the circuit court on the bond of a justice of the peace, for not paying over money collected, &c., the declaration need not aver (as the statute requires in some other cases against a justice,) that the money had been demanded at the office, or residence of the justice, an averment of a demand on him personally, before the commencement of the suit, being sufficient.—*The State* vs. *Harding et al.*, 5 Blackf. 504.

At a time a justice's bond was executed, there was no law authorising it. Held, that the bond was not warranted by law, and that no suit could be sustained on it.—*Silver et al* vs. *The Governor*, 4 Blackf. 15.

If in trespass for false imprisonment against a magistrate he plead in justification, that the arrest, &c. was by virtue of a warrant issued by him against the plaintiff as the father of a bastard child, on the complaint of the overseers of the poor, and show that the child was not then born, or omit to state that the complaint was reduced to writing, or that the mother had failed to prosecute for the child's maintenance, or that the warrant was in due form—the plea is insufficient.—*Poulk et al.* vs. *Slocum*, 3 Blackf. 421.

An action of trespass lies against a magistrate for imprisonment by virtue of a warrant in such case issued by him without a complaint authorizing it.—*Ibid.*

A justification in trespass, under a judgment and execution of A., a justice, requires proof that A. is a justice.—*Hunter* vs. *Harris et al.*, 4 Blackf. 126.

A justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed according to the statute, and the party who procures such writ to be issued without previously filing such bond, are trespassers, and liable as such to the party injured.—*Barkeloo* vs. *Randall*, 4 Blackf. 476.

* If a defendant before a justice, after crediting the plaintiff"s demand, claim a balance of more than 100 dollars, his account should be rejected.—*Gharkey* vs. *Halstead*, 1 Carter's Ind. Rep. 389. See same point decided in *Alexander* vs. *Peck*, 5 Blackf. 308.

A plea to the jurisdiction of the justice in assumpsit was not sworn to; but the plaintiff went to trial on it before the justice of the peace, and on appeal in the circuit court, without mentioning the defect. Held, that the objection was waived.—*McCormick* vs. *Maxwell*, 4 Blackf. 168.

If a purchaser of real estate at sheriff's sale refuse to pay the purchase-money, he may be proceeded against by notice and motion before a justice of the peace, if the notice set forth a claim not exceeding 100 dollars.—*Cowgill* vs. *Wooden*, 2 Blackf. 332. And see *Steelton* vs. *McNeely*, 6 Blackf. 76.

An action of debt may be brought in this State upon the judgment of a justice of the peace in another State; but a *scire facias* to procure the award of an execution on such a judgment does not lie.—*Hoagland* vs. *Rogers*, 3 Blackf. 501.

The statement of demand filed before a justice, need not show that the justice has jurisdiction of the suit; but if such statement show the justice's want of jurisdiction, the suit will be dismissed.—*Perkins* vs. *Smith*, 4 Blackf. 299. *Alexander* vs. *Peck*, 5 Blackf. 308.

The declaration (in assumpsit) in a justice's court, contained three counts,

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Cases in which justice cannot adjudicate.

SEC. 11. But no justice shall have jurisdiction in any action of slander, for malicious prosecution, or breach of marriage contract, nor in any action wherein the title to lands shall come in question, or the justice be related by blood or marriage to either party.*

When title to land is involved

SEC. 12. If the title to land shall be put in issue by plea supported by affidavit, or shall manifestly appear from the proof on trial to be in issue, the justice shall, without further proceeding, certify the cause and papers to the circuit court of the proper county, where the same shall be tried.

each claiming fifty dollars, and had no conclusion limiting the amount claimed. Held, that the suit should be dismissed for want of jurisdiction.—*Swift* vs. *Woods*, 5 Blackf. 97.

The declaration in debt before a justice of the peace contained four counts, each for 62 dollars. Held, that the justice had no jurisdiction.—*Wetherill* vs. *The Inhabitants, &c.*, 5 Blackf. 357.

An execution issued by a justice of the peace, reciting a judgment for 102 dollars and 36 cents, without showing how much of the judgment was for the debt, and how much for the interest thereon, was held not to be void.—*The State* vs. *Westbrook et al.*, 7 Blackf. 138.

It will be presumed that the justice, in rendering such judgment, was acting within his jurisdiction.—*Ibid.*

The court of a justice of the peace is a court of record.—*Hooker et al.* vs. *The State*, 7 Blackf. 272.

Debt before a justice of the peace on a bond in the penalty of 500 dollars. The plaintiff claimed 50 dollars damages. Held, that the justice had jurisdiction.—*Anderson* vs. *Farns*, 7 Blackf. 343.

An execution issued by a justice of the peace, reciting a judgment rendered by him for 102 dollars, with interest and costs, was held to be valid.—*The State* vs. *Burnside et al.*, 7 Blackf. 577.

Though a note filed before a justice of the peace as a cause of action, be, on its face, for a sum beyond its jurisdiction, yet if the amount actually demanded and recovered be within it, the presumption is that the note had been so reduced by credits as to authorize the justice, under the statute, to take cognizance of the cause.—*Remington* vs. *Henry*, 6 Blackf. 63.

A constable may sue in a justice's court, by notice and motion, for the price of goods sold by him on execution, with ten per cent. damages, if the demand do not exceed 100 dollars.—*Steepleton* vs. *McNeely*, 6 Blackf. 76.

In debt before a justice of the peace, a delivery-bond in the penalty of 208 dollars, was filed as the cause of action; the value of the property to be delivered not being stated, and there being no statement limiting the demand to 100 dollars, or less. Held, that the justice had no jurisdiction.—*Beard et al.* vs. *Kinney et al.*, 6 Blackf. 425.

In a suit by the State, on the relation, &c., on a justice's bond, the breach assigned was that the justice had rendered judgment in an action of debt in favor of the relator against one R. for 95 dollars and 87 cents, and costs; that the justice had improperly taken replevin-bail, &c., and neglected to issue execution, &c. Held, that the declaration sufficiently showed that the justice had no jurisdiction of the suit against R., it appearing that the action was debt, and the amount recovered less than 100 dollars.—*The State* vs. *Hook*, 6 Blackf. 515.

See *Chandler et ux.* vs. *Davidson*, 6 Blackf. 367; *Middleton* vs. *Harris*, 6 Blackf. 397.

* A confessed judgment, rendered by a justice in favor of his brother, is not void. *Eastwood* vs. *Buell*, 1 Carter's Ind. Rep. 434. This decision was overruled in the case of *Wells* vs. *Dawson et al.*, at the May term, 1852.

To a suit on a promissory note commenced before a justice of the peace, a plea that the note was given in consideration that the payee would convey certain land to the defendant; that the payee had no title to the land, and that he had failed to make the deed, does not oust the justice of jurisdiction.—*Rogers* vs. *Perdue*, 7 Blackf. 302.

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Justice's court—jurisdiction—docket—transcript—commencement of suit.

No person to be sued out of his township.

SEC. 13. No person shall be sued before any justice out of the township where he resides, except as hereinafter specified, unless such suit is commenced by a *capias ad respondendum*, or when there shall be no justice competent to act in such township. *

Where there are several defendants.

SEC. 14. Where there is more than one defendant, and they reside in different townships, suit may be commenced in either township, and process served upon all others whereever found in the county, and they held to answer in such suit.

Actions of trespass.

SEC. 15. Suits for trespass to real and personal property may be brought either in the township where the defendant resides, or where the trespass was committed, and process served throughout the county.

On official bonds.

SEC. 16. Official bonds of officers may be sued on before justices, where the damages claimed for breach of the condition thereof, do not exceed one hundred dollars.

Oaths, subpœnas, attachments, &c.

SEC. 17. Justices shall have jurisdiction, co-extensive with the county, to administer oaths, issue subpœnas, and attachments for contempt, in any cause pending before them, or in any matter where they may be authorized to take testimony.

Docket.

SEC. 18. Every justice shall, in a substantial bound book of not less than two hundred pages, keep a docket, in which he shall record the proceedings in full, of all suits instituted before him, which record shall contain the names of the parties at full length, a copy of the cause of action and of the set-off of the defendant, if any, and all proceedings had therein, and the amount of the judgment written out in words; and every such record of each cause, shall, when completed, be signed by such justice, and the cause noted in a proper index to be contained in such docket; and every clerk when he shall deliver to any justice his commission shall direct his attention to this section.

Transcript.

SEC. 19. Such justice shall, on being paid at the rate of ten cents per hundred words therefor, furnish to any person demanding the same, a certified transcript of any such record of any suit instituted before him, or contained in any docket legally in his possession.

Commencement of suit.

SEC. 20. Suits may be instituted before justices by agreement or process, and the delivery of the process to the officer authorized to serve the same, if by process, and the entry of the fact upon the docket, if by agreement, shall be deemed such commencement; and it shall be the duty of such officer to note on such process the date when it came to his hands.

* The objection that a defendant in a justice's court was sued out of the proper township, is waived, unless made before the justice.—*Allison* vs. *Hedges*, 5 Blackf. 546.

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Justice's court—summons—service—arrest—time of trial—change of venue.

Summons.

SEC. 21. Except in cases otherwise provided, such process shall be a summons, specifying a time not less than three nor more than thirty days from the date, and a place, at which the defendant shall appear; and in actions founded on contract the justice shall indorse thereon the precise sum demanded, and the costs accrued.

Service.

SEC. 22. Such summons shall be served at least three days before trial, by reading the same to the defendant, or leaving a copy thereof at his last usual place of residence, and if not so served, such cause shall be continued for a reasonable time.*

When not to serve by copy.

SEC. 23. If an absent defendant have left his usual place of residence, for an uncertain period, or a period certain but extending beyond the return day thereof, the constable being apprised thereof, shall not serve the same by copy.

Capias ad respondendum.

SEC. 24. Whenever it shall appear from the affidavit of the plaintiff or some other person, that such plaintiff has a legal demand then due, against any person then in, or about to come in any county, and that such defendant, as the affiant believes, is about to leave the State or the county, taking with him property subject to execution, or other means with which such demand might be paid in whole or in part, with intent to delay or defraud his creditors, any justice shall issue a capias ad respondendum against such defendant, which shall be returnable forthwith, and may be served anywhere in the county where issued.†

Arrest.

SEC. 25. The officer serving such writ shall forthwith arrest the defendant and convey him before such justice, and notify the plaintiff, his agent, or attorney, thereof.

Time of trial.

SEC. 26. The defendant shall be entitled to a trial within twenty-four hours after being brought before the justice, and if the trial shall not commence within that time he shall be discharged from custody.

Changes of venue.

SEC. 27. Changes of venue shall be granted, at any time before the trial is commenced, whenever affidavit is made before the justice by either party:

First. That such justice is a material witness in the cause for either party.

* A judgment of a justice against a defendant without either actual or constructive notice to him of the suit, or his appearance to it, is a nullity.—*Allen* vs. *Chadsey*, 1 Carter's Ind. Rep. 399.

The statute of 1838 required the summons of a justice of the peace to be served at least three days (the day of service being excluded from the computation,) before the time of appearance.—*Wort* vs. *Finley*, 8 Blackf. 335.

† A *capias ad respondendum* issued by a justice of the peace, without an affidavit, against a person not a resident and householder of his county, operates as a summons, and does not justify an arrest and imprisonment. *Kreger* vs. *Osborn et al.*, 7 Blackf. 74.

A party who causes a magistrate to issue, and the magistrate who issues, legal process, are not responsible for the unlawful manner of serving it, unless they participate in the unlawful act.—*Ibid.*

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Second. That such affiant believes he cannot have an impartial trial before such justice, on account of his interest, bias or prejudice.

Third. That he cannot have an impartial trial in the township, owing to the bias, interest or prejudice of the citizens thereof.

Where cause is sent.

SEC. 28. If a change be granted on the ground named in the first or second specification of the last preceding section, such cause shall be sent to some other justice of the same township if there be one competent to try the same; if there be no competent justice within the township, or the change be granted on the grounds named in the third specification of the last preceding section, then such cause shall be sent to some justice of an adjoining township.

Costs to be paid.

SEC. 29. No change of venue shall be granted, except on payment or confession of judgment therefor, and replevy thereof, of all costs occasioned by the change, if taken by a defendant, and of all accrued costs and the cost of such change, if taken by the plaintiff.

Transcript to be transmitted, &c.

SEC. 30. The justice granting the change, shall transmit a certified transcript of his proceedings and all papers in the cause to the justice to whom he may send such case, who shall proceed therein as if such suit had been originally instituted before him, as well as to changes of venue as other incidents of the trial.

Next friend.

SEC. 31. Infants shall appear by next friend, to be appointed by the justice; all other persons may appear in person, or by agent, or attorney; but no constable or justice shall act as such agent or attorney.

Forms of action abolished.

SEC. 32. All forms of action, heretofore known by distinct names, are abolished; and but one form of action, to be called a "complaint," shall be used; and the parties to such action shall be called the plaintiff and defendant respectively. *

What causes may be joined.

SEC. 33. All causes of action founded on contract may be joined in one complaint; and all causes founded on tort be joined in like manner; but causes founded on contract shall not be joined with causes founded on tort.†

Defense.

SEC. 34. All matter of defense, except the statute of limitations, set-off, and matter in abatement may be given in evidence without plea; matter in abatement must be pleaded under oath: *Provided*, that the execution of a written instrument, or any assignment thereof, sued on, shall not be denied, except by special plea, verified by affidavit. ‡

* See ante, R. S. vol. 2, p. 27. † See ante, R. S. vol. 2, p. 43.

‡ Although a suit be commenced in a justice's court, the defendant cannot have the benefit of the plea of *non est factum*, unless it be pleaded and sworn to.—*Neely* vs. *Chinn*, 8 Blackf. 84.

In actions on contract commenced in a justice's court, the defendant may,

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Justice's court—complaint.

Complaint.

SEC. 35. In all suits commenced by summons, the plaintiff shall, three days before the return day of the writ, file with the justice a statement of the grounds of his complaint, or the written instrument which is the foundation of his suit; and in actions against officers on their official bonds, a certified copy thereof, and an informal statement of the breach complained of, and the damages claimed, shall be sufficient; or failing to file such statement within such time, his complaint shall, on motion of the defendant, be continued at the cost of the plaintiff; or if none be filed before the hour of trial, the cause shall be dismissed. *

under the general issue, give any matters in evidence which, under that plea, are admissible in other courts. See *Cowgill* vs. *Wooden*, 2 Blackf. 332.

The defendant in a justice's court has the benefit of the general issue, though it be not pleaded, and though a special plea be filed.—*McHatton* vs. *Bates*, 4 Blackf. 63.

A promissory note was filed as the cause of action before a justice of the peace, and the general issue pleaded without oath. Held, that the execution of the note was admitted.—*Parry* vs. *Henderson*, 6 Blackf. 72.

In a suit on a note before a justice of the peace, evidence that the plaintiff, in consideration that the defendant would pay him a certain sum, agreed to forbear to sue for a certain time, &c., is admissible under the general issue.—*McClelland* vs. *Quarles*, 3 Blackf. 459.

The defendant, in a suit in a justice's court, cannot object to the writ for want of an indorsement on it of the sum claimed, after he has appeared and pleaded to the action.—*Swift* vs *Woods*, 5 Blackf. 97.

A writ was issued by a justice of the peace in the name of *J. & R. M. Secrest*, plaintiffs. Held, that a motion of the defendant to dismiss the suit, made before his appearance and plea to it, should be sustained.—*Secrest* vs. *Arnett*, 5 Blackf. 366.

The want of jurisdiction of the justice may be pleaded or given in evidence under the general issue.—*Perkins* vs. *Smith*, 4 Blackf. 209.

The defendant in a justice's court may show under the general issue, that the process had not issued in the proper township.—*Thomas* vs. *Winters*, 4 Blackf. 161.—*M'Cormick* vs. *Maxwell*, 4 Blackf. 168.

If either party in a justice's court require proof of the execution by himself of a bond, &c., its execution must be denied on oath.—*Wilson* vs. *Merkle et al.*, 6 Blackf. 118.

See *Nelson* vs. *Zink*, 3 Blackf. 101.

*See ante, R. S. vol. 2, p. 37.

Judgment for the plaintiff in a suit before a justice of the peace. Appeal to the circuit court by the defendant. The circuit court dismissed the suit; and on a writ of error, the judgment of dismissal was affirmed. The reason given for the affirmance was, that it did not appear from the transcript of the record, that the plaintiff below had filed any statement of his demand, or any note or other writing relied on as the cause of action.—*Bell* vs. *Trotter*, 4 Blackf. 12.

In an appeal from the judgment of a justice of the peace to the circuit court, the cause of action filed with the justice need not be copied or referred to in the justice's transcript.—*White* vs. *Fortune*, 6 Blackf. 116.

Any statement of the cause of action in the transcript, however short and informal it may be, will answer the purpose, provided enough be shown to bar another action for the same demand.—*Denby* vs. *Hart*, 4 Blackf. 13.

The transcript of a justice's judgment, as shown on the appeal in the circuit court, commenced as follows: "Jesse Davar, assignee of Thomas Grimes vs. William Moberly. Debt on note for 24 dollars; interest 5 dollars and 55 cents." Held, that the transcript showed with sufficient certainty what was the cause of action —*Moberly* vs. *Davar*, 5 Blackf. 409.

In the case of an appeal, the justice is bound to file his transcript within

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the time prescribed by statute, though his fees have not been paid or tendered. *Ingram* vs. *Plasket*, 3 Blackf. 450.

In a justice's court, an article of agreement between the parties, containing conditions precedent, to be performed by the plaintiff, may be filed as the cause of action without an averment of the performance of the conditions.—*Wiley* vs. *Shank*, 4 Blackf. 420.

In a suit before a justice of the peace, a bond with a condition which appears to have been executed between the parties to the suit, may be filed as the cause of action without an assignment of breaches.—*Vandagrift* vs. *Tate*, 4 Blackf. 174. *Evans* vs. *Shoemaker*, 2 Blackf. 237.

The filing of a delivery-bond before a justice of the peace, as a cause of action, is sufficient without a declaration.—*Barber* vs. *Summers*, 5 Blackf. 339.

NOTE.—If the penalty of the bond be more than one hundred dollars, the cause of action must show that the amount claimed does not exceed one hundred dollars, or the suit will not be within the jurisdiction of the justice. See *Washburn* vs. *Payne*, 2 Blackf. 216.

In a suit commenced before a justice of the peace, by the assignee against the assignor of a promissory note, the plaintiff need only file, as a cause of action, the note with the assignment.—*Watson* vs. *New*, 4 Blackf. 313.

A note payable to a woman, who is one of two plaintiffs in a suit before a justice of the peace, is not a sufficient statement of the cause of action, without an averment of her marriage with her co-plaintiff.—*Vandagrift* vs. *Tate*, 4 Blackf. 174.

When a written contract between the litigating parties is filed as the cause of action in a justice's court, the want of an averment of extraneous facts connected with the contract and necessary to be proved on the trial, is not a fatal objection, if enough be stated to bar another suit for the same demand.—*Cook* vs. *Hedges*, 6 Blackf. 184.

In a suit commenced before a justice of the peace, by the assignee against the assignor of a promissory note, the note and assignment may be filed as the cause of action.—*Hardesty* vs. *Kinworthy et al.*, 8 Blackf. 304.

A suit in a justice's court was entitled "Allen Hamilton, executor of James Wilcox vs. Charles W. Ewing. Debt. Demand, 34 dollars. And a promissory note given by the defendant to James Wilcox for 30 dollars, was filed as the cause of action. Held, that the cause of action was insufficient.—*Hamilton* vs. *Ewing*, 6 Blackf. 88.

The cause of action filed before a justice of the peace, in debt against a constable and his surety, was a copy of an instrument of writing, purporting to be executed by the defendant, in the form of a constable's bond, (except that it was not sealed,) with an assignment of breaches of the condition appended to it. Held, that the cause of action under the statute was sufficient.—*The State* vs. *Mowbray*, 6 Blackf. 89.

In a suit in a justice's court against a constable and his sureties, on a bond conditioned, &c., the bond without an assignment of breaches, may be filed as the cause of action.—*Olds et al.* vs. *The State*, 6 Blackf. 91.

A. B. and C. commenced a suit in a justice's court, describing themselves as late traders under a certain firm, and filed a note executed by the defendant to the firm as their cause of action; plea, admitting the plaintiffs to be the payees of the note, but alleging, &c. Cause transferred to the circuit court. Held, that the objection, if any, to the note as a cause of action, was cured by the admission in the plea.—*Wilson* vs. *Merkle et al.*, 6 Blackf. 118.

Assumpsit in a justice's court. The declaration stated, in substance, that the defendant had received from the plaintiff certain bottles of cough drops at a certain price, to be sold for him or returned; and that payment for such as had been sold and a return of the residue had been demanded and refused. Held, that the declaration was sufficient.—*Crosby et al.* vs. *Tichenor*, 6 Blackf. 418.

The statement of demand in a suit by an administrator in a justice's court was substantially as follows: The defendant, on, &c., had "swapped" a certain bay horse to A., the intestate, and delivered the horse to him; the defendant afterwards took the horse into his possession without the plaintiff's consent, and converted him to his use, &c. To the plaintiff's damage, &c. Held, that this was a sufficient statement in trover.—*Davis* vs. *Davis*, 6 Blackf. 394.

A statement of the demand before a justice is sufficient, if it apprise the defendant of the nature of the claim, and be such that a judgment in the suit may be used as a bar to another action for the same cause.—*Smith* vs. *The Dis. Trustees, &c.*, 5 Blackf. 40.

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Set-off.

SEC. 36. Matters of set-off claimed by the defendant, shall be filed in writing before entering upon the trial, and shall be set forth with the same certainty required in the complaint of the plaintiff. *

Replication.

SEC. 37. No replication shall in any case be necessary, but any matter which might have been replied to any plea, may be proved with the same effect as if so replied.

Amendment.

SEC. 38. Either party may be permitted to amend his pleading before or during trial; but such amendment, if it requires any new proof of the other party, or authorize the party making it to introduce any proof he could not otherwise introduce, shall be ground of continuance at the cost of the party making such amendment, unless it be made at least three days before trial.

Proof of plf. and deft.

SEC. 39. The proof of the plaintiff shall be confined to the allegations of his complaint, and such proof as may be necessary to rebut the proof of the defendant. The proof of the defendant shall be confined to such matters of defense as he is by this act authorized to prove without plea, and to proof of such special pleas as he may file.

All claims due to be included.

SEC. 40. The plaintiff in complaints founded on open accounts, shall embrace all claims then due on account, or failing so to do, shall pay the costs of any subsequent suit on claims not so embraced.

Continuance.

SEC. 41. When a cause is commenced by capias, continuance shall not be granted except by consent; except on motion of the defendant, supported by affidavit, showing that he has a defense against the plaintiff's claim, and the reasons why he cannot then establish such defense; and such continuance, shall not be for longer than sixty days, and such defendant shall give special bail, or be committed to jail in default thereof.

Special bail.

SEC. 42. Such special bail shall be entered on the docket of the justice, in substantially the following form:

"I acknowledge myself special bail for the appearance of A——— B———, to this suit on the ——— day of ——— 18—. (signed) C——— D———.

Test: E——. F——, *justice.*

Discharge and surrender of defendant.

SEC. 43. After such defendant has been committed to jail he may at any time be discharged by the justice on such bail being entered; and any special bail may at any time before final judgment against himself, surrender his principal, when he shall give other bail, or be committed as in the first instance; and such bail shall then be discharged on the payment of all costs in the preceedings against him as such bail.

Judgt. against bail, on default of principal.

SEC. 44. If a defendant at large on special bail as above provided shall fail to appear at the time and place set for trial,

* See ante, R. S. vol. 2, p. 39.

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Justice's court—continuance—witnesses—party may be, when.

the cause shall be heard and determined in his absence, and such special bail shall be liable to the plaintiff for the amount of such judgment unless he surrender his principal before judgment against himself.

Continuance.

SEC. 45. All other actions may be continued on affidavit when justice requires it, which affidavit may be amended and re-sworn to, for a period not longer than sixty days, at the cost of the party making such application; unless in cases, where either party has subpœnaed the other and he fails to attend, and the cause is continued for his testimony, in which case the party so failing to attend shall pay such costs, unless he be unable to attend, and then such costs shall abide the result of the suit.

Witnesses, &c.

SEC. 46. Justices shall have power to subpœna witnesses and enforce their attendance by attachment and fine, not exceeding five dollars, to enforce order when judicial proceedings are in progress before them, by fine not exceeding five dollars, and imprisonment not exceeding three hours.

More than two witnesses to one fact.

SEC. 47. Any party causing witnesses to be subpœnaed, and not swearing and examining them if in attendance, shall pay the cost occasioned thereby, unless the use of such witness or witnesses be dispensed with by the admission of the opposite party; any party calling more than two witnesses to a fact not contradicted by any other witness, shall pay the cost occasioned by such supernumerary witness; no claim of attendance shall be allowed a witness, unless made before the judgment is entered and signed.

Party may be made a witness.

SEC. 48. Either party may in all cases have the other sworn as a witness, and if the plaintiff refuse to appear on being personally subpœnaed, or being present refuse to swear, the cause shall be dismissed; if the defendant refuse to appear on being personally subpœnaed, or being present, refuse to swear, the plaintiff's demand shall be taken as confessed; no set-off allowed, and judgment entered accordingly; but such testimony shall not be used as evidence in any other case, civil or criminal, against such party testifying.*

*If in an action of debt or assumpsit, commenced before a justice of the peace, the cause of action be denied by plea, the plaintiff may, on the trial, either before the justice or on appeal, examine the defendant on oath as a witness; but the defendant is not bound, unless thus under oath, to answer any questions in the cause. —*Hubble* vs. *Hubble*, 3 Blackf. 205.

The admissions made by a party examined under oath on a trial before a justice of the peace, cannot be proved in the circuit court on appeal, the party being in court, on the trial of the appeal, and not then examined. — *Carter* vs. *Buckner*, 3 Blackf. 314.

The defendant against whom a judgment had been rendered by a justice, appealed to the circuit court. The transcript not being filed in time by the justice, the appeal was dismissed, and the appellant sued the justice for his neglect. Held, that the plaintiff in this case might prove admissions, made on the trial of the original suit, by the plaintiff there, tending to show that there was no foundation for that suit.—*Ingram* vs. *Plasket*, 3 Blackf. 450.

The justice, in this case, had filed the appeal-bond in the clerk's office after the

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Depositions.

SEC. 49. Depositions of witnesses or parties residing out of the county, or sick, or about to leave the same, may be taken under the rules prescribed by law for taking depositions; and if such party or witness be absent from the county or unable to attend at the trial, may be read as evidence in any cause; and no dedimus shall be necessary in such case. *

To be under seal, &c.

SEC. 50. Such depositions shall be sent under seal to the justice trying the cause, and may be opened at any time, the parties consenting thereto, or on the day set for trial, on motion of either party.

Jury.

SEC. 51. The issues of fact shall be tried by the justice, unless either party demand a jury, which jury shall consist of twelve qualified voters of the township, to be summoned by a constable by venire issued by the justice: *Provided, however*, that the number may be less than twelve by consent of the parties.

Challenge.

SEC. 52. Either party may challenge for cause, or may peremptorily challenge half the jury; and such jury shall be sworn by the justice, truly to try the matter in difference between the parties and a true verdict to give according to law and evidence.

Rules of evidence.

SEC. 53. The rules of evidence shall be the same as in the circuit court, except as in this act otherwise provided. †

When the jury disagrees.

SEC. 54. Whenever a jury after having consulted together for a reasonable time, shall report to the justice that they cannot agree, he shall discharge them, and continue the cause until another day.

Security for costs.

SEC. 55. Justices shall require security for costs from plaintiffs living out of the county.

New trials.

SEC. 56. New trials may be granted by justices at any time within four days after entering judgment, according to the usages of the circuit court, notice of the motion therefor having been given to the opposite party, unless such motion is made in his presence, or the presence of the agent or attorney who conducted his suit. ‡

limited time. Held, that the circumstance of his having filed the bond, precluded him from requiring the plaintiff to prove its execution.—*Ibid.*

* See ante, R. S. vol. 2, p. 84. † See ante, R. S. vol. 2, p. 98.

‡ See ante, R. S. vol. 2, p. 117.

A judgment of a justice of the peace is set aside by the granting of a new trial in the cause within the time allowed by law for that purpose.—*Robideau* vs. *Ewing et al.*, 5 Blackf. 552.

The circumstance that on the trial of a cause before A. B., a justice, without a jury, the justice was, with consent of parties, assisted by C. D., another justice, who sat and consulted with him on the trial, is no objection to the judgment pronounced in the case by A. B.—*Dougherty* vs. *Mason*, 4 Blackf. 432.

If the plaintiff, without objection, enter into a new trial before a justice, which had been irregularly granted to the defendant, and obtain a judgment from which the defendant appeals, the irregularity in granting the new trial is no cause for dismissing the appeal.—*Jones* vs. *Rodman et al.*, 4 Blackf. 492.

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Justice's court—judgment by default—not found as to part—appeals.

Notice.

SEC. 57. When such new trial is granted, the justice shall set a day for the same; and cause at least three days' notice thereof to be given to the party against whom the motion was granted.

Judgment, when entered and signed.

SEC. 58. When a suit shall be dismissed, judgment confessed, the verdict of a jury returned, or the defendant be in actual custody, judgment shall be entered and signed immediately; in all other cases, judgment shall be entered and signed within four days after the trial.

Judgment by confession.

SEC. 59. Judgments may be rendered by confession, and no appeal shall lie therefrom; but the same may be collaterally impeached for fraud by creditors of the judgment-debtor, and such judgment shall be void as to such creditors unless at the time of the rendition thereof the defendant makes affidavit that he justly owes the debt. *

Bal. in favor of defendant.

SEC. 60. If there shall appear a balance in favor of the defendant, judgment for the amount, not exceeding the jurisdiction of the justice, shall be entered in his favor.

Judgment by default.

SEC. 61. If the defendant being legally notified, fail to appear, judgment may be entered against him by default, upon proof heard, for the amount of the plaintiff's demand.

May be set aside on motion.

SEC. 62. Such judgment by default may be set aside, on motion, at any time within ten days thereafter, on payment of all costs, and when so set aside, the justice shall set a day for trial and cause at least three days' notice thereof to be given to the plaintiff, and if judgment by default shall a second time be entered, it shall not again be set aside.

Return of not found as to part of defts.

SEC. 63. When a summons is returned not found as to part of the defendants, the plaintiff at his option may continue for alias process, or suggest the return on the record, dismiss the cause as to the defendants not found, and proceed against those served; and such plaintiff may at any time afterwards proceed against those not found.

Appeal.

SEC. 64. Any party may appeal from the judgment of any justice to the court of common pleas of the county, or the circuit court, within thirty days from the rendition thereof, and when there are two or more plaintiffs or defendants,

* *Scire facias* before a justice against replevin-bail. The *scire facias* described the judgment as a joint one against C. and D. Appeal to the circuit court, and judgment for the plaintiff. The transcript showed that D. confessed the claim to be just. The plaintiff proved by the justice that, at the time of the rendition of the judgment, C. had no notice of the pendency of the suit; did not appear to it; and that D. had no authority to confess for him. Held, that the judgment was not joint, and did not tend to establish the issues on the part of the plaintiff.—*Allen vs. Chadsey*, 1 Carter's Ind. Rep. 399.

See note to section 11, of this act.

A judgment confessed before a justice of the peace without the oath prescribed by the statute, is good against the party confessing it. And if such party, being a *feme sole*, afterwards marry, the judgment is also good against her husband.—*Campbell et al. vs. Baldwin*, 6 Blackf. 364.

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one or more of such plaintiffs or defendants may appeal without joining the others in such appeal.*

Bond. Sec. 65. The appellant shall, except in cases where the same is dispensed with by law, file with the justice a bond with security to be approved by the justice, payable to the appellee, in a sum sufficient to secure the claim of the appellee, and interest and costs, conditioned that he will prosecute his appeal to effect, and pay the judgment that may be rendered against him in the court of common pleas or circuit court.†

* An appeal lies from the final judgment of a justice of the peace, to the circuit court, however informal the judgment may be.—*Brewer* vs. *Murray*, 7 Blackf. 567.

After an entry of judgment for the plaintiff on a justice's docket, this statement followed, viz: "On, &c., comes the defendant, and files an appeal-bond, but does not ask an appeal until he further considers the matter." Held, that notwithstanding that statement, the defendant might, on appeal, show by affidavits that the appeal was prayed for when the appeal-bond was filed.—*Fraser* vs. *Smith*, 6 Blackf. 210.

The certificate to a justice's transcript was as follows: "I, Samuel Dale, a justice of the peace in and for Noble township, county and State aforesaid, hereby certify the above to be a true transcript from my docket. June 1, 1841. Samuel Dale, J. P., [seal.]" Held, that the certificate was sufficient.—*Wiley* vs. *Forsee*, 6 Blackf. 246.

On appeal to the circuit court from the judgment of a justice of the peace, the certificate of the justice, annexed to his transcript, was as follows: "I hereby certify that the foregoing is a true transcript of the proceedings had before me in the above cause; as appears from my docket. Given under my hand and seal," &c. Held, that the certificate was sufficient.—*Whitney* vs. *Mills*, 6 Blackf. 545.

† The circuit court overruled the appellee's motion to dismiss an appeal. The motion was founded on the affidavit of a third person of his belief that the appeal-bond was not executed within the time required by the statute. The record and bond showed on their face, that the bond was executed and filed in time. Held, that the motion was correctly overruled.—*Malaby* vs. *Hinkston*, 4 Blackf. 127.

Debt on an appeal-bond against the surety. Breach, the non-prosecution of the appeal to effect. Plea, that the plaintiff filed an affidavit that the defendant was insufficient surety, and moved to dismiss the appeal; that a rule was entered requiring the appellant to file an additional bond, and, on his failing so to do, the appeal was dismissed. Held, that the plea was bad, and that a failure to give bond, when required, is a breach of the condition of the first bond.—*Davis* vs. *Sturgis*, 1 Carter's Ind. Rep. 213.

The circumstance that an appeal-bond, in the case of an appeal from the judgment of a justice of the peace, bears date after the bond was filed in the clerk's office, is no objection to the bond.—*Littel et al.* vs. *Bradford*, 8 Blackf. 185.

And the fact that an appeal had been prayed for, need not be recited in the justice's transcript.—*Ibid.*

The failure to prosecute an appeal from a justice's judgment, in consequence of the death of the appellant, is a breach of the condition of the appeal-bond.—*Legate et al.* vs. *Marr*, 8 Blackf. 404.

Declaration in debt on a bond conditioned to prosecute with effect, an appeal from the judgment of a justice of the peace. Breaches, 1st, That the appellant wholly failed to prosecute the appeal. 2d, That he failed to cause a transcript of the judgment to be filed in the clerk's office within twenty days after taking the appeal. 3d, That he did not prosecute the appeal with effect, but, on the contrary, the appeal was dismissed because the transcript of the judgment was not filed in the clerk's office within twenty days, &c. Held, on general demurrer, that the first and third breaches were good, and the second bad.—*Rock* vs. *Gordon et al.*, 6 Blackf. 192.

Suit on an appeal-bond against the executors of one of the sureties. The appeal had been taken by a defendant from a judgment against him in ejectment; and the bond was conditioned for the prosecution of the appeal with effect, and

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Justice's court—appeal—transcript—trial—after thirty days, when.

Transcript.

SEC. 66. On the filing of such bond the justice shall make out and certify a complete transcript of all the proceedings had before him, and transmit the same, together with such bond and all other papers in the cause, to the clerk of the court of common pleas, or the circuit court to which the appeal is taken, within twenty days thereafter, or failing so to do, shall forfeit all his cost in the case; but no such appeal shall be dismissed for such failure of the justice, nor for the insufficiency of the bond, if the appellant will file a sufficient bond to the acceptance of the court of common pleas or circuit court.*

Trial in court above.

SEC. 67. Such cause shall stand for trial in the court of common pleas, or circuit court, whenever such transcript has been filed ten days before the first day of the term thereof, and be there tried under the same rules and regulations prescribed for trials before justices, and amendments of the pleadings may be made on such terms, as to costs and continuances, as the court may order.

Appeals after thirty days, when may be taken.

SEC. 68. Appeals may be authorized by the court of common pleas or circuit court after the expiration of thirty days, when

the payment of the condemnation-money and costs should the judgment be against the appellant. Breach, that the appellant did not prosecute the appeal with effect, and that the judgment was affirmed. Held, that the plaintiff could not in this suit, recover the *mesne profits*. Held, also, that the breach assigned was sufficient.—*Doe* vs. *Daniels et al.*, 6 Blackf. 8.

In debt on a bond, conditioned to prosecute an appeal from the judgment of a justice with effect, &c., the defense was, that the appeal was not taken within twenty days from the rendition of the judgment, and was for that cause dismissed. Held, that the defense was insufficient.—*Wood* vs. *Thomas et al.*, 5 Blackf. 553.

* The filing of the transcript, &c. in the clerk's office is sufficient evidence, *prima facie*, that the appeal had been duly prayed for and granted.—*Humble* vs. *Williams*, 4 Blackf. 473. See *Maxam* vs. *Wood*, 4 Blackf. 297. *Boiles* vs. *Barnes*, 4 Blackf. 176.

After judgment, a new trial was granted. On the day fixed for a new trial, the justice set aside the order for a new trial, and affirmed his previous judgment. Held, that the time for taking an appeal should be reckoned from the date of the judgment last rendered.—*Bowers* vs. *McNutt*, 5 Blackf. 231.

The certificate of a justice of the peace to a transcript of his judgment in a cause, filed in the clerk's office, in the case of an appeal, was as follows: "State of Indiana, Fountain county, ss. I, H. S. Scott, a justice of the peace in and for said county, certify that the above is a full and true transcript of the above case from my docket. Given under my hand and seal this 15th day of April, 1842. H. S. Scott, J. P. (seal.) Held, that the certificate was sufficient. —*Ward* vs. *Hazelrigg*, 7 Blackf. 46.

The failure of a justice of the peace, in the case of an appeal, to file the papers in the clerk's office in time, is no cause for dismissing the appeal.—*Lacy* vs. *Fairman*, 7 Blackf. 558.

The filing of an appeal-bond with the transcript, &c., in the clerk's office by the justice, in the case of such appeal, is *prima facie* evidence that he had approved of the bond.—*Ibid.*

The transcripts of two judgments of a justice of the peace, written on the same sheet of paper, may be authenticated by one certificate of the justice, including in its terms both transcripts.—*Remington* vs. *Henry*, 6 Blackf. 63.

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the party seeking the appeal has been prevented from taking the same by circumstances not under his control. *

Appeals dismissed.

SEC. 69. When an appeal is dismissed by the court, such fact shall be certified to the justice by the clerk, and such judgment stand on the justice's docket as if no appeal had been taken.

Costs.

SEC. 70. Costs shall follow judgment in the court of common pleas, or circuit court, on appeals with the following exceptions: †

First. If either party against whom judgment has been rendered, appeal and reduce the judgment against him five dollars or more, he shall recover his costs in the court of common pleas, or circuit court, when the appellant appeared before the justice.

Second. If either party in whose favor judgment has been rendered, appeal and do not recover at least five dollars more than he recovered before the justice, the appellee shall recover his costs in the court of common pleas or circuit court.

Replevin.

SEC. 71. Whenever any plaintiff shall, by complaint in writing verified by affidavit, set forth that his personal goods not exceeding in value one hundred dollars, have been wrongfully taken, or are unlawfully detained by any other person, specifically describing such property and giving the value thereof, and alleging that the same has not been taken by virtue of any execution or other writ against him, and claiming damages for the detention or taking the same not exceeding one hundred dollars in addition, and shall file with such justice a bond with surety to be approved by such justice and payable to the defendant in a sum double the value of such goods, conditioned that he will prosecute such complaint to effect and return such goods to such defendant if judgment of return be awarded him, and pay all damages awarded such defendant, the justice shall issue to some constable of the county his writ, commanding him to take the property described, and deliver the same forthwith to such plaintiff, and

* An affidavit made in the circuit court to procure an order authorizing an appeal from the judgment of a justice of the peace, after the expiration of 30 days, must show that the party was prevented from taking the appeal in time by unavoidable circumstances, or improper conduct of the justice, or of the appellee.—*Thomas* vs. *Littlefield*, 1 Carter's Ind. Rep. 361.

† If the plaintiff in a justice's court, having obtained a judgment, appeal, and fail to recover at least five dollars more than the justice's judgment, the appellee will be entitled to costs.—*Carter* vs. *Berkshire*, 8 Blackf. 193.

The defendant appealed from the judgment of a justice of the peace against him for ten dollars, and the plaintiff obtained a judgment in the circuit court for only one cent. Held, that the defendant was entitled to costs.—*Lewis* vs. *Masters*, 8 Blackf. 244. See, also, *Allen* vs. *Hardesty*, 8 Blackf. 589. Judgment for the plaintiff for costs, he having succeeded on one of the issues, &c. Held, that it must be presumed, the record being silent on the subject, that the taxation of costs was correct.—*Nichols* vs. *Woodruff*, 8 Blackf. 493.

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that he summon said defendant to appear at a time and place therein named, before such justice, to answer such complaint.*

Service. SEC. 72. Such constable shall serve such writ anywhere in the county, by obeying the command thereof, and the defendant may be summoned by copy thereof, left at his last usual place of residence.

Trial. SEC. 73. Such cause shall be tried as other causes before justices; if the cause be dismissed or the defendant prevail, judgment shall be rendered in his favor for his costs, and that he have return of the property; if the plaintiff prevail, he shall have judgment for damages for the taking or detention of the same and costs.

Judgment when property is not found. SEC. 74. If the property claimed, or any part thereof, cannot be found by the constable, the suit shall proceed as if it had been so found, and if such property, not so found, is adjudged to be the property of the plaintiff, and liable to have been recovered in that action, if it had been found, he shall recover the value thereof in damages, whether he shall have claimed that amount as damages in his complaint or not.

Practice in other cases. SEC. 75. In all cases not in this act specially otherwise provided, proceedings before justices, shall be governed by the practice and usages of circuit courts, and the rules of the common law so far as the same are in force in this State.

Executions. SEC. 76. Justices shall, unless otherwise directed, issue executions on all judgments when the party appeared, after four days from the rendition thereof, and in cases of judgment by default after the expiration of ten days from the rendition thereof: *Provided*, That in cases of judgment by confession, and in cases commenced by capias, and in cases when it shall be made to appear by affidavit that delay will

* See ante, R. S. vol. 2, p. 54.

If in replevin before a justice, the defendant appear, plead in bar, and go to trial, without objecting to the affidavit, he cannot afterwards object to it as an affidavit. But the affidavit in such case may answer for the statement of demand; and in that character it may be objected to or amended as other statements of demand.—*Perkins* vs. *Smith*, 4 Blackf. 299.

On an appeal in replevin the plaintiff, as in other cases, may have leave to amend his statement of demand filed before the justice, by inserting the value of the property.—*Ibid.*

If, in an action of replevin in a justice's court, the statement of demand filed before the writ issued, state the value of the property, the omission of the amount of such value in the affidavit is not material.—*Mooney* vs. *Myers*, 5 Blackf. 331.

If, in an action of replevin commenced before a justice of the peace, the affidavit filed be such as the statute on the subject requires, no other statement of the demand is necessary.—*Andre* vs. *Johnson*, 6 Blackf. 188.

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endanger the collection of the judgment, execution shall be issued immediately after entering judgment.*

To whom directed. SEC. 77. The execution shall be directed to any constable of the county, and shall be substantially in the form hereinafter prescribed, and may be served throughout the county.

When a lien. SEC. 78. Such constable shall indorse on such execution the day and hour when it came to his hands; and from that time it shall operate as a lien on the property of the judgment-debtor, liable to be seized on it; which lien shall be divested in favor of any other writ in the hands of another officer, which shall be first levied on such property.

Return. SEC. 79. Such execution shall be made returnable at the expiration of six months; but may be sooner returned if satisfied, or no property of the defendant can be found.

Alias execution SEC. 80. Whenever an execution is returned by an officer having the same, that he has levied the same, and has the property unsold in his hands, or has a delivery-bond for the same, the justice shall issue another execution, and shall append thereto a copy of such return, and such property may be sold on such alias execution in the same manner as on the first execution, and if such property be insufficient, other property may be levied on to satisfy such writ, either before or after such sale.

Sales, how conducted. SEC. 81. The sale of property under such execution as to appraisement and the number of offers to sell, shall be governed by the laws regulating sales of personal property under execution, issued from the circuit court.†

Where one of the defts. is surety. SEC. 82. Whenever it shall appear from the docket, the justice shall note on the execution, whether any of the defendants are sureties; and if so noted, it shall be the duty of the officer executing the same, first to levy on the goods of the principal; and if enough of such goods can be found to satisfy the execution, no levy shall be made on the goods of the surety.

* A term for years in real estate may be sold on an execution from a justice's court.—*Barr* vs. *Doe d Binford*, 6 Blackf. 335.

Debt on the bond of a justice, the ground of complaint being that he had not issued execution on a judgment in time. Held, that an averment in the declaration that the judgment was rendered on the 1st of April, 1836; that the justice neglected to issue execution thereon till the 16th of May, and that the execution was returned unsatisfied, was equivalent to saying that, down to the time of the return, the judgment had not been paid or replevied. Held, also, that the justice was bound to issue execution on the judgment within a reasonable time; and that such time had elapsed in this case before the execution issued. Held, also, that an averment in the declaration, that the justice had been requested to issue an execution on the judgment, and had refused to do so, was mere surplusage.—*The State* vs. *Brown et al.*, 5 Blackf. 494.

A justice having rendered a judgment for the plaintiff, was directed by him not to issue an execution until the time for taking an appeal had expired. Held, that in such case, the justice was not bound to issue an execution until the plaintiff requested it.—*Tingle* vs. *Pullium*, 4 Blackf. 442.

A mistake in the amount of an execution is amendable, at any time, by the judgment.—*McCall* vs. *Trevor et al.*, 4 Blackf. 496.

† See ante, R. S. vol. 2, p. 137.

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Justice's court—executions—notice—stay—judgment without relief.

Notice of sale.

Sec. 83. All sales on execution shall be at public auction, in the township where the goods were seized, between the hours of ten in the forenoon, and five in the afternoon, and ten days' notice of the time and place of such sale shall be given by the constable, by posting up written notices in three public places in such township, and such constable shall not directly or indirectly become a purchaser at such sale.

Stay of execution.

Sec. 84. In all cases where a stay of execution is not prohibited by law, the judgment-defendant, shall have stay of execution, by entering replevin bail on the docket of the justice, in substantially the following form:

I, A——— B———, hereby acknowledge myself replevin-bail for the stay of execution, on the above judgment for —— days from the rendition thereof. Witness my hand this —— day of ——— 18—. A. B.

Test: E——— F———, *Justice.*

And the justice shall be responsible for the solvency of such bail at the time when taken, unless the plaintiff consent thereto; and such undertaking shall have the effect of a judgment confessed; and execution shall issue thereon at the expiration of such stay jointly against the defendant and such bail; and it shall be the duty of the justice to issue execution thereon at the expiration of the stay, unless otherwise ordered by the plaintiff.*

When no stay is allowed.

Sec. 85. No stay of execution or appraisement of property shall be allowed in the following cases:

First. On judgments against officers, executors, administrators, guardians, or commissioners appointed to sell land, for the violation of any duty connected with their office or trust.

Second. On any official bond, or bond given to secure the faithful discharge of the duties of any trust, as to the principal in such bond.

Third. On any judgment for money received in trust and not paid over on proper demand.

Fourth. Against any corporation, other than municipal

Fifth. On any judgment on a forfeited delivery-bond.

Judgment without relief, &c.

Sec. 86. Where the note or obligation sued on is payable without relief from valuation or appraisement laws, such agreement shall be made a part of the judgment, and shall be noted on the execution, and property sold without appraisement to satisfy the same.

Time of stay

Sec. 87. If such judgment, exclusive of costs, do not exceed six dollars, such stay shall be for thirty days; if over six

* Bail for the stay of execution of a judgment rendered by a justice of the peace must be entered on his docket, and is a matter which may be proved by a transcript, at least when the entry is not denied on oath.—*Remington* vs. *Henry*, 6 Blackf. 63.

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and under twelve dollars, sixty days; if over twelve and under twenty dollars, ninety days; if over twenty and under forty dollars one hundred and twenty days; if over forty and under seventy-five dollars, one hundred and fifty days; if over seventy-five dollars, one hundred and eighty days.

Delivery-bond.

SEC. 88. The execution-defendant shall be entitled to the custody of goods levied upon by virtue of any execution issued by a justice, by executing a delivery-bond, with surety, payable to the execution-plaintiff, under the rules and regulations prescribed for the execution of delivery-bonds to sheriffs in similar cases; and the constable taking the same shall be responsible for the sufficiency of the bond and the solvency of the sureties at the time of the execution thereof.*

When bond is forfeited.

SEC. 89. If the condition of such bond be broken, the execution-plaintiff may prosecute his remedy thereon, or may by alias execution cause the same or other property to be levied on, or having failed in either remedy, may afterward resort to the other.

No appeal in such case.

SEC. 90. No appeal shall be allowed the defendant from a judgment before a justice on a delivery-bond, unless he show by affidavit, that he has merits in such appeal.

Deft. not entitled to property, &c.

SEC. 91. When the condition of a delivery-bond has been broken, and the same, or other property afterwards levied on by the same execution, or another execution on the same judgment, the defendant shall not be entitled to the custody of such property.

Measure of damages.

SEC. 92. In suits on a delivery-bond, the amount due on the execution, if the property was worth so much, if not the value of the property, and in both cases ten per cent. in addition, shall be the measure of damages.

Execution-debtor may sell property for not less than two-thirds, &c.

SEC. 93. If an execution-debtor having executed a delivery-bond for any goods, shall sell the same or part thereof for not less than two-thirds the appraised value, and shall apply all the proceeds of such sale to payment of the judgment, if so much be necessary, the failure to deliver such property so sold shall not be a breach of the condition of such bond.

* See ante, R. S. vol. 2, p. 138.

Debt on delivery-bond commenced before a justice. Plea, that the articles mentioned in the condition of the bond, belonging to the execution-defendant, who, at and before the period when they were to have been delivered, claimed them from the constable as being exempted from execution by law, on the ground that he had not personal property of the value of 100 dollars, including said articles; that he had a family, and that he had not 100 dollars of personal and household property over and above the property levied on. Held, that the plea was bad, and that the filing of the bond was a sufficient cause of action.—*Barb r et a* . vs. *Summers*, 5 Blackf. 339.

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Justice's court—discharge of replevin-bail—new bail—*ca. sa.*—affidavit.

Remedy of Bail.

Affidavit. SEC. 94. Any replevin-bail desirous of being discharged from his liability, may make affidavit that he is apprehensive of being made liable thereon, if execution be farther delayed; and on the filing of such affidavit, the justice shall cause the defendant to be notified in writing, that unless he give other replevin-bail, execution will issue thereon, and if such defendant shall not, within three days after service of such notice, give other bail, execution shall issue in the same manner as if the stay had expired.

New bail. SEC. 95. Such new bail shall be entered on the docket in form substantially as follows:

I, A. B., acknowledge myself replevin bail for the stay of execution on the above judgment until the —— day of ——, 18—, instead of C. D. discharged.

Witness my hand this ——— day of ———, 18—.

(Signed) A. B.

Test: E. F. *Justice.*

And shall operate as a discharge of the former bail.

When bail pays judgment. SEC. 96. When a replevin-bail has paid the judgment, or any part thereof, the same shall stand unsatisfied for his use, and he may have execution thereon.

Capias ad Satisfaciendum.

Ca. sa. SEC. 97. Execution shall not be entered against the body, except as hereinafter provided.

Affidavit. SEC. 98. The creditor wishing such execution, his agent or attorney shall file with the justice an affidavit, charging the debtor with fraudulently concealing, removing or transferring his property subject to execution, with intent to defraud or delay such creditor, or that he has moneys, rights, credits or effects, with which the judgment of such creditor, or some part thereof, might be paid, and which he fraudulently withholds or conceals, with a view to delay or defraud his creditor.

Contents of affidavit as to specific property. SEC. 99. Such affidavit need not designate specifically any property, moneys or effects, fraudulently removed, transferred, concealed, or withheld by such debtor; but the justice or jury in determining the matters in issue between the parties, if the finding be for the creditor, shall designate in such finding the moneys, effects, property or things in action which have been thus removed, concealed, transferred or withheld, and also the value thereof.

Summons. SEC. 100. Upon the filing of such affidavit, such justice shall issue a summons, requiring such debtor to appear and show cause why execution against his body should not issue.

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Service and return.

SEC. 101. Such summons shall be made returnable in five days from date, and be served and returned in the same manner as other summonses.

Failure of debtor to appear.

SEC. 102. If such debtor fail to appear on the return day, the justice may enter default, and hear and determine the same in his absence, or a jury may be empanneled for that purpose, at the request of the creditor.

Trial, when.

SEC. 103. If such debtor appear to such affidavit, and issue be taken to the country thereon, it shall be tried by the justice, or a jury shall be empanneled at the request of either party to try the same as in other cases.*

Deft., when committed.

SEC. 104. If such trial be determined against such debtor, and he will not forthwith surrender for the benefit of such creditor the moneys, effects, property, or things in action, which may be found to have been removed, concealed, transferred or withheld, or pay the value thereof, an execution shall issue against his body, and be arrested and committed to the prison of the county, there to be confined until duly discharged according to law.

Capias ad respondendum, when may issue in such case.

SEC. 105. If it be made to appear by affidavit, that the plaintiff has reason to believe that such debtor will leave the State before determination of the matters in issue, a *capias ad respondendum* shall forthwith issue against such debtor, and be served and executed as in a personal action.

Special bail.

SEC. 106. Such debtor, on being arrested, may be released from arrest on giving special bail, and may be surrendered by such special bail in discharge of his recognizance, in like manner as is provided for in other cases of special bail in this act.

Recognizance.

SEC. 107. The condition of the recognizance of such special bail shall be, that such execution-debtor will surrender his body in execution, if a *capias ad satisfaciendum* shall be awarded against him, or pay the value of the property or other effects found to be concealed or otherwise withheld; which condition shall be implied from the words "special bail" in the undertaking on the docket.

The constable may take recognizance.

SEC. 108. The constable making such arrest may take such recognizance of bail, either before or after such debtor is committed to prison, and shall make return of his proceedings.

Proceedings on recognizance.

SEC. 109. The like proceedings shall be had on such recognizance of special bail as are authorized by this act against special bail for the appearance of a party arrested on a *capias ad respondendum* and the same taken and entered in like manner and form; but the surety shall only be liable to the extent of the value of the effects found to be fraudulently withheld, concealed, transferred, or removed.

* The discharge, with the plaintiff's consent, of a defendant in custody on a *ca. sa.*, operates as a discharge of the judgment.—*Wakeman et al.* vs. *Jones et al.*, 1 Carter's Ind. Rep. 517.

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Miscellaneous.

Special constable.

SEC. 110. Whenever there shall be no constable convenient, and in the opinion of the justice an emergency exists for the immediate services of one, such justice may appoint a special constable to act in a particular cause; and shall note such appointment in such cause on the docket, and shall direct process to him by his name; and such constable so appointed shall discharge the duties, receive the fees, and have the powers, in such cause, appertaining to the office.

Justice to be liable.

SEC. 111. The justice appointing such constable shall, with his sureties, be liable on his official bond, for any neglect of duty, or illegal proceedings by such constable in such cause.*

Process issued on Sunday, when.

SEC. 112. Process may be issued on Sunday, whenever it shall appear by affidavit that the object of such process would probably be defeated by delaying to another day.

Justice and court not to purchase judgments, &c.

SEC. 113. No justice or constable of the same township shall, directly or indirectly, purchase any judgment or interest therein on the docket of such justice, or upon any docket in his possession; and any such purchase shall operate as a satisfaction of such judgment, to the extent of the interest therein purchased.

To receive and pay over money.

SEC. 114. Justices shall receive all money collected on process by them issued, and all money tendered them on any judgment on their docket, or any docket in their possession, and shall pay over the same on proper demand to the person authorized to receive the same; and for failure so to pay the same, he shall be liable on his official bond for such money, with interest thereon from the time of such demand, and twenty per cent. in damages in addition. †

* A constable, appointed by a justice of the peace to levy an execution on the goods of A., levied the same on the goods of B. A trial of the right of property was claimed by B., who gave bond, &c., but the constable refused to deliver the goods to B. Held, that, for this misconduct of the constable, the justice was liable to B. in an action on the case.—*Dugan* vs. *Melogue*, 7 Blackf. 144.

The jury in such case may, though the constable tender to the plaintiff the property, before suit brought, give the value of the property as the amount of the damages.—*Ibid.*

If a justice of the peace, without any authority of law, appoint a constable, and take his bond with surety for the discharge of his duty, the appointment and bond are void.—*Olds et al.* vs. *The State*, 6 Blackf. 91.

† The demand required to be made on a justice of the peace before a suit for money collected by him can be sustained on his bond, may be made at any time before the commencement of the suit.—*Parker et al.* vs. *The State*, 8 Blackf. 292.

A declaration in such suit which stated that the justice, by virtue of his office, had collected and received the money, substantially avers that the money was received by the justice whilst he was in office.—*Ibid.*

A justice of the peace has no authority, without special directions from the judgment-creditor, or person entitled to the judgment, to receive any thing but

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Justice's court—satisfaction of judgment—papers to be handed over, when.

Satisfaction of judgment.

SEC. 115. Any person alleging satisfaction in whole or in part of any judgment on a justice's docket, may file his complaint in writing, showing specifically in what manner such satisfaction was made; and summons for the other party shall be issued and served, and the complaint heard and determined, and satisfaction entered or refused, as in other cases; and pending such suit, execution on such judgment shall be recalled, on the plaintiff in such complaint giving bond and surety in double the amount of such judgment, payable to the defendant in such complaint, and conditioned for the payment of the judgment, if his complaint be determined against him.*

In case of vacancy, papers to be handed to whom.

SEC. 116. Whenever the office of any justice becomes vacant, all dockets, papers and laws which came to his hands by virtue of his office, shall be delivered to his successor; or if no successor has yet been elected and qualified, then to the nearest justice in the township; or if there be none in the township, then to the nearest justice in the county, to be by him kept until such successor be elected and qualified, and then delivered to such successor.

Justice absenting himself more than 30 days.

SEC. 117. Any justice absenting himself from the township for a longer period than thirty days, shall deposit the dockets, books and papers which came to his hands by virtue of his office, with the nearest justice of his township.

Justice with whom docket is deposited may give transcripts, &c.

SEC. 118. A justice with whom the docket of another may be deposited during vacancy or absence, and the successor of any justice, having the dockets of his predecessor in his possession, may issue process thereon, give transcripts thereof, and do all other acts in relation thereto, which he might legally do in relation to his own dockets. But process so

gold and silver in payment of a judgment rendered by him.—*Hooker et al.* vs. *The State*, 7 Blackf. 272.

The judgment of a justice may, by statute, be so assigned as to authorize the assignee to be the relator, in a suit on the justice's bond for the money collected by the justice on the judgment.—*Ibid.*

As to the averments necessary in an information against a justice of the peace for unlawfully and oppressively collecting money, &c., see *The State* vs. *Odell*, 8 Blackf. 396.

* If satisfaction of a judgment be entered by a justice of the peace on his docket, he and his sureties are liable for the amount to the judgment-creditor; no matter for what consideration the satisfaction was entered, unless the creditor was a party to the arrangement.—*Modisett* vs. *The Governor*, 2 Blackf. 135.

A justice of the peace may hear and determine an application to enter satisfaction of a judgment on his docket, whenever the debtor alleges judgment or satisfaction, due notice of the application having been given; and an appeal from the determination in such case lies to the circuit court.—*Creekpaum* vs. *Templeton*, 5 Blackf. 583.

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issued shall be returned to the justice who may have the legal custody of such docket at the return day thereof.*

Affidavit to be filed, when no execution has issued for three years.

SEC. 119. Whenever any judgment has remained without the issue of execution thereon for the space of three whole years, no execution shall issue thereon, unless on affidavit filed, showing that such judgment is unsatisfied, and how much is yet due thereon.

Revival of judgment, when.

SEC. 120. Judgment in favor of any deceased person, may be revived in favor of his personal representatives, on complaint and summons as in other cases.

Proceedings when execution deft. dies after levy and before sale.

SEC. 121. When an execution-defendant shall die after levy and before sale, the property levied on shall be sold in the same manner, as if he was alive; but if no levy has been made in such case, such execution shall be returned without farther proceedings, and its lien on the goods of the defendant divested; and if the plaintiff die after execution has issued, the same shall be executed and returned as if such plaintiff were living.

Attachment

SEC. 122. Justices may issue writs of attachment against the personal property of a debtor under the rules prescribed for the prosecution of such writs, when the amount claimed by any one creditor does not exceed one hundred dollars, and their jurisdiction in such case shall be co-extensive with the county.†

Ne exeat

SEC. 123. Justices shall have power to issue writs of ne exeat under the rules prescribed for the issue of such writs, when the amount claimed does not exceed one hundred dollars.‡

Scire facias abolished.

SEC. 124. Writs of scire facias before justices are abolished, and all suits which might heretofore have been prosecuted by them, may be prosecuted by complaint and summons.

Action upon transcript.

SEC. 125. Action by complaint and summons may be maintained upon the transcript of a judgment from any other justice's docket in the name of the judgment-plaintiff, or his assignee; and such transcript and assignment shall be a sufficient complaint without other statement.

* On the docket of justice A., which, for some reason not shown, was in justice B's. hands, there was a receipt purporting to be signed by B., of a judgment there entered. Held, that the receipt was not admissible as evidence against B., without proof of his having executed it.—*Modisett* vs. *The Governor*, 2 Blackf. 135.

A justice of the peace with whom the docket of a former justice is legally deposited, may give certified copies from such docket; but the certificate must show that the justice making it has the legal custody of the docket.—*Anderson* vs. *Miller*, 4 Blackf. 417.

† See ante, R. S. vol. 2, p. 62.

A justice of the peace had no authority, previous to the revised statutes of 1843, to issue a summons against an executor as garnishee in attachment.—*Harmon* vs. *Burchard*, 8 Blackf. 418.

‡ See ante, R. S. vol. 2, p. 185.

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Where there is no acting justice in a township.

SEC. 126. Whenever there is no acting justice of the peace in any township, the nearest justice in an adjoining township shall have jurisdiction of all cases arising in such township having no justice.

FORMS.

SEC. 127. The following forms shall be used by justices as nearly as the circumstances will permit; but no writ or judgment shall be invalid for want of form, if it contain the substance:

Summons.

The State of Indiana, Clark county ss:

To any constable of Charlestown township:

You are hereby commanded to summon John Doe to appear before me, at my office, on the first day of January, 1852, at ten o'clock in the forenoon, to answer Richard Roe in a complaint wherein he claims the sum of ten dollars, and return then and there this writ.

Dated this 10th December, 1851.

RICHARD STILES, *Justice.* [SEAL.]

Capias ad respondendum.

The State of Indiana, Clark county ss:

To any constable of Clark county:

You are commanded to take John Doe and forthwith bring him before me, at my office, to answer Richard Roe on a complaint, wherein he claims ninety dollars, and notify the plaintiff, his agent, or attorney, of such arrest, and have then and there this writ.

Dated 10th December, 1851.

RICHARD STILES, *Justice.* [SEAL.]

Subpœna.

The State of Indiana, Clark county, ss.

To any constable of Clark county:

You are commanded to summon John Stiles and Peter Warner to appear before me at my office on the first day of January, 1852, at ten o'clock in the forenoon, to testify on the part of the plaintiff in the case of John Doe *vs.* Richard Roe, and have then and there this writ.

Dated this 10th December, 1851.

RICHARD STILES, *Justice.* [SEAL.]

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Fieri Facias.

The State of Indiana, county of Clark, ss:

To any constable of Clark county:

Whereas, John Doe obtained judgment against Richard Roe, as appears of record, on a docket now in my possession, for fifteen dollars, with interest from the first day of January, 1852, together with five dollars for costs; You are therefore commanded to make the same, together with all accruing costs, by levy and sale of the goods of Richard Roe, and make return thereof within six months from date.

Dated this 20th January, 1852.

RICHARD STILES, *Justice.* [SEAL.]

Capias ad satisfaciendum.

The State of Indiana, Clark county, ss:

To any constable of Clark county:

Whereas, John Doe obtained judgment against Richard Roe, as appears of record on a docket now in my possession, for fifteen dollars, with interest from the first day of January, 1852, together with five dollars for costs: And whereas, a writ of *capias ad satisfaciendum* has been awarded on said judgment against the said Richard Roe: You are therefore commanded to take said Richard Roe, and unless he pay said judgment, costs and accruing costs, commit him to jail until discharged by law.

Dated this 10th January, 1852.

RICHARD STILES, *Justice.* [SEAL.]

Writ of Attachment.

The State of Indiana, county of Clark.

To any constable of Clark county:

Whereas, John Doe has filed with me the affidavit and bond, necessary to entitle him to a writ of attachment against Richard Roe for the sum of fifty dollars, claimed to be due said John Doe from the said Richard Roe. You are therefore commanded to attach the goods, chattels, rights, credits, moneys and effects of said Richard Roe in your county, to be kept and disposed of according to law, and make legal return hereof.

Dated this 1st January, 1852.

RICHARD STILES, *Justice.* [SEAL.]

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Summons for a Garnishee.

The State of Indiana, Clark county, ss.

To any constable of Clark county:

Whereas, a writ of attachment has been by me issued on the complaint of John Doe, against the goods and chattels, rights and credits of Richard Roe; and whereas, it has been made to appear by affidavit, that John Smith is indebted to said Richard Roe, (or has property of said Richard Roe in his possession, as the case may be.) You are hereby commanded to summon said John Smith, to appear before me, at my office on the 20th of January, 1852, at ten o'clock in the forenoon to answer under oath, such questions as may be asked him in relation thereto, and have then and there this writ.

Dated this 12th Jannary, 1852.

RICHARD STILES, *Justice.* [SEAL.]

Writ on complaint for the wrongful taking or detention of Property.

The State of Indiana, county of Clark.

To any constable of Clark county:

You are commanded to take the following goods and chattels, to-wit: nine hogs, one cow, and one sorrel horse, alleged to be in the possession of Richard Roe, and deliver the same forthwith to John Doe, and further, that you summon the said Richard Roe to appear before me, at my office on the 10th of January, 1852, at ten o'clock in the forenoon, to answer the complaint of said John Doe, wherein he claims said property and twenty dollars in damages for the detention of the same.

Dated this 1st January, 1852.

RICHARD STILES, *Justice.* [SEAL.]

Docket entry of trial and judgment.

JOHN DOE, *vs.* RICHARD ROE. } Complaint for sixty-one dollars.

January 1st, at request of plaintiff, summons issued, returnable the 10th of January, 1852, at ten o'clock in the forenoon, and was delivered to John Smith, constable.

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January 3d, 1852, plaintiff filed his complaint in the words and figures following: [Here insert the complaint.]

January 6th, 1852, subpœna issued at the request of plaintiff for Henry Smith, and delivered to John Smith, constable.

January 10th, 1852. The parties appeared for trial, and on plaintiff's motion, supported by affidavit, cause continued until the 15th of February, 1852, at the cost of the plaintiff.

February 15th, 1852. Parties appeared. Defendant moved to dismiss the complaint for insufficiency, which motion was overruled. On plaintiff's motion, he was permitted to amend his complaint as follows: [Here insert the amendment.]

Defendant filed set-off in the words and figures following: [Here insert the set-off.] And also the following special plea: [Here insert the plea.]

A jury having been demanded by the defendant, and the parties having agreed to the number of six, venire issued therefor, and being returned, the following named persons were sworn as jurors, to-wit: [here insert the names of the jurors,] who, after hearing the evidence, returned into court the following verdict:

"We, the jury, find that the plaintiff recover of the defendant the sum of eleven dollars.

JOB HAYS, *Foreman.*"

It is therefore adjudged that the plaintiff recover of the defendant the sum of eleven dollars, with interest from date, together with his costs, and accruing costs.

RICHARD STILES, *Justice.*

Judgment by default.

January 10th, 1852. This day came the plaintiff; the defendant came not, but made default; and it appearing from the return of the summons, that the same had been served on the 3d of January, 1852, and the plaintiff having made proof of his complaint, it is adjudged that the plaintiff recover of the defendant the sum of ten dollars, with interest from this date, together with his costs, and accruing costs.

RICHARD STILES, *Justice.*

Judgment on a note, payable without relief from valuation laws.

It is adjudged that the plaintiff recover of the defendant the sum of twenty dollars, with interest from this date, together with his costs and accruing costs, and that he have execution therefor, without relief to said defendant from valuation laws.

RICHARD STILES, *Justice.*

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Bond on complaint for wrongful taking or detention of property.

We, John Doe and Henry Smith, acknowledge ourselves bound to Richard Roe, in the penal sum of one hundred dollars. Witness our hands and seals this first of January, 1852.

The condition of this obligation is, that whereas, said John Doe has filed his complaint before Richard Stiles, justice, averring that said Richard Roe does unlawfully detain from him, one sorrel horse, of the value of fifty dollars, upon which complaint he prays restitution of said property. Now if said John Doe shall prosecute said complaint to effect, and return said property, if return be awarded to said Richard Roe, and pay all costs and damages adjudged against him in such action, then said obligation shall be void.

JOHN DOE, [SEAL.]
HENRY SMITH, [SEAL.]

Test:
RICHARD STILES, *Justice.*

Verdict and judgment for the plaintiff on complaint for the wrongful taking and detention of property.

We, of the jury, find that the defendant did wrongfully take (or detain, as the case may be,) the property of the plaintiff named in the complaint, and that the plaintiff recover of the defendant the sum of eleven dollars.

JOB HAYS, *Foreman.*

It is therefore adjudged that the plaintiff recover of the defendant the sum of seven dollars, with interest from this date, and his costs and accruing costs.

RICHARD STILES, *Justice.*

Verdict and judgment for defendant on like complaint.

We, the jury, find that the defendant did not wrongfully take (or detain, as the case may be,) the property of the plaintiff; and that the defendant have return thereof.

JOB HAYS, *Foreman.*

It is therefore adjudged that the defendant be acquitted in this action and recover of the plaintiff his costs, and that he have return of said property.

RICHARD STILES, *Justice.*

If the facts do not justify verdict and judgment for a return of the property, that part of the form may be omitted.

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Verdict and judgment in case of the unlawful detention of lands.

We, the jury, find that Richard Roe did at the commencement of this suit unlawfully detain from John Doe possession of the following described tract of land, to-wit: The west half of lot numbered eighty on the plat of the town of Jeffersonville, in Clark county, Indiana, and that said John Doe is entitled to possession thereof, and to recover of said Richard Roe, ten dollars for such detention.

JOB HAYS, *Foreman.*

It is therefore adjudged that said John Doe have restitution of the premises in said verdict named, and that he recover of said Richard Roe the sum of ten dollars, with interest from this date, and costs and accruing costs.

RICHARD STILES, *Justice.*

Writ of restitution, on complaint for the unlawful detention of lands.

The State of Indiana, county of Clark, ss:

To any constable of Clark county:

You are commanded forthwith to put John Doe in possession of the west half of lot numbered eighty, on the plat of the town of Jeffersonville, in said county, by removing therefrom Richard Roe and his goods; and that of the goods of said Richard Roe, by distress and sale thereof, you make the sum of ten dollars, with interest from the 1st of January, 1852, together with costs, taxed at four dollars, and accruing costs, for which said John Doe has judgment against said Richard Roe, as appears of record on my docket, and of this writ make legal service and return.

RICHARD STILES, *Justice.* [SEAL.]

Dated this 1st January, 1852.

Appeal Bond.

We, Richard Roe and John Smith, acknowledge ourselves bound to John Doe in the penal sum of fifty dollars. Witness our hands and seals, this 2d January, 1852.

Whereas, said John Doe, within thirty days last passed, obtained judgment against Richard Roe, before Richard Stiles, justice, for twenty dollars with costs taxed at five dollars, and said Richard Roe has appealed therefrom: now if said Richard

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Roe shall prosecute his appeal to final judgment and pay such judgment as may be rendered against him on such appeal; this bond shall be void, else in force.

RICHARD ROE, [SEAL.]
JOHN SMITH, [SEAL.]

Taken and approved by me this 2d day of January, 1852.

RICHARD STILES, *Justice.*

SEC. 128. In all other cases not herein provided for, justices shall adopt and use the forms prescribed for use in the circuit court, with such variations as circumstances may require.

CHAPTER 2.

AN ACT prescribing the number, and defining the powers and duties of Constables.

[APPROVED MAY 27, 1852.]

Number of constables.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That there shall be annually elected at the April elections, in each township, a number of constables, equal to the number of justices of the peace in any such township, who shall hold their office for one year from such election.*

Bond

SEC. 2. Constables shall give official bond in the penalty of one thousand dollars.†

Duty of a constable.

SEC. 3. It shall be the duty of a constable:

To serve all process.

First. To serve all process legally in his hands, according to the command thereof, and make legal return thereof.‡

To attend trials.

Second. To attend all trials in which he may have served

* Under the statute of 1838, a special constable need not take an oath, nor give bond, unless required by the justice.—*State* vs. *Trapp*, 8 Blackf. 312.

† A constable's bond was given to the treasurer of Fountain county, and on suit on it brought in that name, *held*, that the action could not be sustained.—*Piggot et al.* vs. *The Treasurer, &c.*, 3 Blackf. 255. See 3 Blackf. 486.

A constable's bond is not void because the penalty is not fixed, as required by the statute.—*State* vs. *Lynch et al.*, 6 Blackf. 168.

A constable's bond, though not executed till after he had commenced the duties of his office, may be sued on for any breach committed subsequent to the execution.—*Dickens et al.* vs. *The State*, 7 Blackf. 358.

‡ If the time, in a warrant, when the offense is alleged to have been committed, is later than the date thereof, the constable is justified in executing it. If there be two offenses charged in the warrant, and the justice has jurisdiction over both, the constable is bound to execute it. A special constable may command assistance.—*Patterson* vs. *Kise et al.*, 2 Blackf. 127.

A constable is virtually within the statute requiring sheriffs to pay rent before the removal of goods from demised premises, and when sued for improperly pay-

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process, and preserve order, and enforce all legal orders of the justice during such trial.

Third. To note upon all writs, other than subpœnas, the time of receiving the same, and all acts by him done in obedience to the command thereof. To note on writs time of reception, &c.

Fourth. To pay over to the proper plaintiff, or to the proper justice, without delay, all money by him collected by virtue of any writ. To pay over money.

Fifth. To act as conservator of the peace, and apprehend and take, forthwith, before the nearest justice, all who violate the law in his presence, and then charge them with such violation on oath. To act as conservator of peace.

Sixth. To levy every execution, and make at least one offer to sell property levied upon within one month after such execution comes to his hands, if property can be found, unless otherwise directed by the plaintiff, or his agent.* To levy executions, &c.

ing rent, is bound to give some evidence that the rent is due.—*Ungles* vs. *Graves*, 2 Blackf. 191.

When a constable justifies an arrest, &c., under a *capias ad satisfaciendum*, which, under the statute, he is bound to return, the plea must aver a return of the execution, or show a sufficient reason for the failure.—*May* vs. *Sly*, 5 Blackf. 206.

The declaration in a suit on a constable's bond, when the breach relied on is a failure to execute a *ca. sa.* against several persons, must aver that whilst the constable held the execution, the debtors, or some of them, were in his bailiwick, and might have been arrested. On overruling a demurrer in such case, judgment ought not to be rendered without a jury of inquiry.—*Jones et al.* vs. *The State*, 5 Blackf. 492; 6 Blackf. 32.

Under the statute of 1842, the execution might be returned before return day, if the constable could find no goods whereon to levy.—*Middlewood* vs. *Nevitt*, 7 Blackf. 51.

No more than nominal damages ought to be recovered in a suit on a constable's bond, for an escape, when it appears that the debt has been discharged by the surety. The suit being for the benefit of the surety, makes no difference.—*State* vs. *Miller et al.*, 5 Blackf. 381.

In a suit for failure to return an execution, the constable may prove, to reduce the damages, that during the whole time the execution was in his hands, the debtor was insolvent.—*Baker et al.* vs. *Mortimer*, 5 Blackf. 32.

See *Bohon et al.* vs *The State*, 5 Blackf. 467, where it is held that a return by a constable, with proof that it was made by the plaintiff's direction, would excuse the former from serving the execution. See 5 Blackf. 237 and 601.

The declaration should show the illegality of a return complained of.—*Graham et al.* vs. *The State*, 6 Blackf. 32.

* The goods of a tenant indebted to his landlord for rent, were sold by a constable in favor of a third person. The landlord, under the statute, proved the amount due him. Held, in a suit on the official bond of a constable, for refusing to pay rent to the landlord, that the justice's judgment is conclusive as to the amount of rent due. Held, also, that in such suit the landlord is not limited as to the sum to be recovered, by the amount of the execution.—*Darter et al.* vs. *The State*, 5 Blackf. 61.

The declaration must aver that the debtor had goods on which the constable might have levied, in a suit for failure to make the money.—*The State* vs. *Soverns*, 6 Blackf. 168.

A constable may sue under the statute of 1838, p. 286, by notice and motion, for the price of goods sold by him on execution, with ten per cent. damages, if the demand do not exceed 100 dollars.—*Steepleton* vs. *McNeely*, 6 Blackf. 76.

A constable, for refusing to permit a debtor having a family to retain 100 dollars' worth of property exempt, is liable in trespass.—*Stephens et al.* vs. *Lawson*, 7 Blackf. 275. See 8 Blackf. 8, 71 and 270.

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To discharge all other duties.

Seventh. Faithfully and diligently to discharge all other duties imposed on him by law.

Not to make return "no property found," before demanding property.

SEC. 4. No constable shall make return of any execution that no property can be found to satisfy the same, until he has demanded such property at the residence of the defendant, if he have one in such county. *

Shall deliver all writs, &c., to his successor.

SEC. 5. Every constable, on going out of office, shall deliver to his successor, all writs in his hands, with his proceedings thereon endorsed; and also all property levied on and remaining unsold, and all delivery-bonds; and shall take such successor's receipt therefor, including in different receipts, the process from different justices, and shall return such receipts to the proper justices, who shall record the same on their docket, and carefully preserve the original, and they shall, if required, give to such constable a certified copy of such receipt. In case of the death of a constable, his personal representative shall make such delivery, without delay, either to his successor, or if none be appointed, to some other constable of the township, and shall take like receipts and make like return thereof to the justices.

May act throughout county, and call on citizens for assistance.

SEC. 6. Constables in the discharge of their duty, shall have power to act throughout their respective counties, unless specially restrained by law, and whenever necessary, may call upon any number of citizens to assist them in the discharge of their duties, who shall not refuse such assistance, under such penalty as may be prescribed by the criminal law.

On committing prisoner shall leave copy of writ with jailor.

SEC. 7. Whenever any constable shall commit to jail any prisoner in his custody, he shall leave with the jailor the writ, by authority of which he commits such prisoner, and such jailor shall give him a receipt therefor, containing at length a copy of such writ. †

May arrest fugitives any where in the State.

SEC. 8. In executing a warrant for the apprehension of any fugitive from justice, who has fled into another county, from any county in this State, a constable may arrest such offender in any county where he may be found; but if such offender shall request it, he shall not remove him from such county, without taking him before some officer authorized to issue and try writs of *habeas corpus*, and giving such offender time to make application for such writ.

* When a constable having in his hands a *fi. fa.*, has made one full examination for goods, without effect, he may return "no property." — *Wilcox* vs. *Ratliff*, 5 Blackf. 561.

† A constable in his justification of an imprisonment under a magistrate's warrant, must show that the magistrate had jurisdiction of the subject-matter, and that the warrant on its face was legal. If the magistrate who issues a warrant, and the officer who executes it, be sued in trespass, by the party arrested, and join in a plea of justification, the plea must be good as to both, or it is not good as to either.—*Poulk et al.* vs. *Slocum*, 3 Blackf. 421.

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Constables—liability—forms—indorsements and returns.

Liable on bond for failing to make, or making false return.

SEC. 9. Any constable who shall make any false return of any writ, or who shall fail to return the same at the return day thereof, or who shall fail to discharge any duties incumbent on him by law, shall, with his sureties, be liable on his bond to the person injured, to the extent of the injury, with ten per cent. damages thereon.

Also for failure to pay over money.

SEC. 10. Any constable who shall fail to pay over to the proper person, on demand, or to the proper justice, within one month after the receipt of the same, any money he may have collected by virtue of his office, shall, with his sureties, be liable on his bond to the person injured, for such money and twenty-five per cent. in damages on the amount.

Forms.

SEC. 11. The following forms shall be substantially observed by constables, with such variations as circumstances may require:

Indorsement and return of Summons.

Jan. 2d, 1852. Writ came to hand.

Return of summons.

Jan. 3d, 1852. Served the within writ by reading the same to defendant, (or by copy left at his last usual place of residence, as the case may be.) Or, if the defendant is not found, as follows: This writ is not served, the defendant not being found, and having no last usual place of residence in my county. Jan. 10th, 1852.

JOHN SMITH, *Constable.*

Return to a capias ad respondendum.

To capias.

"Jan. 10, 1852. I have the defendant in custody, in obedience to this writ." Or, as the case may be: "The defendant cannot be found in my county."

JOHN SMITH, *Constable.*

Return to a writ on complaint for the wrongful taking or detention of property.

To complaint for detention of property.

Jan. 10th, 1852. I have executed the within writ by seizing the property therein named, and delivering the same to the plaintiff; and on the 4th of January, 1852, served this writ on the defendant by reading, (or by copy thereof left at his last usual place of residence, as the case may be.)

JOHN SMITH, *Constable.*

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Returns on writs of Fieri Facias.

On writs of fieri facias.

Jan. 10th, 1852. I have visited the residence of the defendant in this writ, and can find no property there or elsewhere subject to execution, to levy upon.

JOHN SMITH, *Constable.*

Or, if property be levied upon, and not sold, as follows:

Jan. 10th, 1852. In obedience to the command of this writ, I this day levied upon one bureau and six chairs, and took the same into possession.

Jan. 25th, 1852. Caused the property levied on to be appraised by Job Hays, John Stiles and John Doe, who appraised said bureau at ten dollars, and said chairs at fifty cents each, which appraisement is herewith returned.

Feb. 10th, 1852. Offered the property levied on for sale at auction, but no person bidding therefor the proper amount, the same was not sold.

Feb. 11th, 1852. Defendant, with Thomas Jones as his surety, executed delivery-bond for the property levied on, and the same was delivered to him; and said bond is herewith returned; and no other execution of this writ has been had. Returned this 1st of April, 1852.

JOHN SMITH, *Constable.*

If the property was sold, change as follows:

Feb. 10th, 1852. Property levied on sold pursuant to notice, at auction. Henry Smith purchased the bureau at ten dollars, and John Watkins purchased the chairs at three dollars; and no other property of the defendant subject to execution can be found in my county; (or if further levy and sale, or offer to sell, has been made, state the facts accordingly.)

JOHN SMITH, *Constable.*

Return of a State Warrant.

Of State warrant.

Jan. 2, 1852. I have the defendant named in the within writ in custody. JOHN SMITH, *Constable.*

Delivery-Bond.

Delivery-bond.

We, Richard Roe and James Smith, acknowledge ourselves bound to John Doe in the sum of fifty dollars. Witness, our hands and seals, this 3d day of January, 1852.

Whereas, John Smith, constable, has levied a *fieri facias*, issued by Richard Stiles, justice, in favor of said John Doe

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against said Richard Roe, on one horse, of the value of twenty-five dollars, as the property of said Richard Roe, and is about to return said horse to be kept by said Richard Roe until demanded: Now, if said Richard Roe shall, when requested by said constable, or by any other constable having said *fieri facias*, or any *alias*, or *pluries fieri facias* on the same judgment in his hands, have said horse at the time and place that may be fixed for the sale thereof, and shall then and there return said horse to any such constable, then the above bond shall be void, else in force.

RICHARD ROE, [SEAL.]
JAMES SMITH, [SEAL.]

Test:
JOHN SMITH, *Constable.*

CHAPTER 3.

AN ACT regulating prosecutions in cases of Bastardy, and providing for the support of illegitimate children.

[APPROVED MAY 6, 1852.]

Complaint and process

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That when any woman who has been delivered of, or is pregnant with, a bastard child, shall make a complaint thereof in writing, under oath, before any justice of the peace, charging any person with being the father of such child, such justice shall by his warrant cause such person to be arrested and brought before him.*

Trial.

SEC. 2. Upon the arrest of such person, or the return of the warrant that he cannot be found, such justice shall proceed to hear and determine such complaint.

Prosecution to be in name of State; rule of evidence as in civil cases; woman competent witness.

SEC. 3. The prosecution shall be in the name of the State of Indiana, on the relation of the prosecuting witness, but the rules of evidence shall be the same as in civil cases; and

* Under the statutes of 1843, the place of residence of the mother of the child is immaterial in a case of bastardy.—*State* vs. *Gray*, 8 Blackf. 274.

The mother's affidavit need not state that she is a resident of the county, or that the child was born there, or that it was born alive.—*State* vs. *Allen*, 4 Blackf. 269.

The complaint need not state where the mother resides.—*Beeman* vs. *The State*, 5 Blackf. 165.

Any unmarried woman, resident of the State, may make complaint before a justice, without regard to the place where the child was born.—*Cooper* vs. *The State*, 4 Blackf. 316.

A discharge by a justice is no bar to a subsequent prosecution for bastardy.—*Davis* vs. *The State*, 6 Blackf. 494.

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the mother of the child, if of sound mind, shall be a competent witness.*

Failing to give bond, deft. to be committed, &c.

SEC. 4. If the justice, on hearing, adjudge the defendant to be the father of such child, he shall, if such defendant is in custody, require him to give bond in a sum not less than two hundred, nor more than ten hundred dollars, with sufficient sureties, payable to the State of Indiana, and conditioned, that he will appear at the next term of the circuit court of such county, to answer such complaint, not depart without leave, and abide the judgment and orders of such court; or failing therein, that he will pay such sums of money, and to such person, as may be adjudged by such court; and shall transmit such bond, together with a transcript of his proceedings and the other papers in the cause, without delay, to the clerk of the circuit court of the proper county; and if such defendant shall fail to give such bond, such justice shall commit him to jail until discharged by law; such bond, or any bond given by such defendant on any continuance or arrest may be put in suit by any person in whose favor the court may adjudge any sum of money in such prosecution.†

May be discharged upon filing bond.

SEC. 5. Any person committed to jail, for failure to give such bond, may be discharged from custody, by filing at any time after his commitment, with the clerk, such bond to the satisfaction of such clerk; and a certificate of the clerk to the sheriff shall be sufficient to authorize him to discharge said defendant from custody.

Trial to be governed by law regulating civil suits.

SEC. 6. The trial and continuance thereof of such prosecution both before the justice and in the circuit court, shall

* The prosecution under the statute for the support of illegitimate children must be in the name of the State.—*Dickerson* vs. *Gray*, 2 Blackf. 230; 1 Blackf. 110.

† A trial of a case of bastardy by a justice of the peace on Sunday, is void.—*Chapman* vs. *The State*, 5 Blackf. 111.

The State may appeal from the judgment of a justice in favor of the defendant, in a bastardy case; and no appeal-bond is required. On such appeal the circuit court may order a writ to issue to compel the defendant's appearance.—*Walker* vs. *The State*, 6 Blackf. 1.

A recognizance recited that D., an unmarried woman of I. township, in her examination on oath taken in writing before said justice, had declared that she was on, &c., delivered of a male bastard child, and that O. was the father—and was conditioned for the father's appearance, &c. *Held*, that the recognizance was good.—*State* vs. *Owens et al.*, 6 Blackf. 61.

A justice's transcript in a case of bastardy, omitted to state that the defendant had failed to compensate the mother. *Held*, that the defendant ought not, for that omission, to be discharged. *Held*, also, if compensation had been made, and bond given, &c., the same might have been pleaded in bar.—*State* vs. *Allen*, 4 Blackf. 269.

The original recognizance in a case of bastardy, should be filed by the justice in the circuit court. It is no objection to such recognizance that it is entered into by a third person, and not by the party himself.—*State* vs. *Lewis*, 4 Blackf. 20.

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Bastardy—testimony—continuance—escape—death of mother.

in all respects not herein otherwise provided for, be governed by the law regulating civil suits.*

Justice shall reduce testimony of mother to writing—return same to circuit court; failure so to do not ground for dismissal.

SEC. 7. The testimony of the mother shall be by such justice reduced to writing, read carefully to such witness and by her be signed, and shall by such justice be returned to the circuit court with the other papers in such case, to be used by either party to sustain or impeach the testimony of such witness. The failure of the justice so to do, shall not be ground of dismissal in the circuit court, but such justice shall recover no fees in such case.†

Upon continuance, deft. to give bond, &c., as in secs. 4 and 5.

SEC. 8. Upon any continuance granted either party, the court or justice granting the same shall require of the defendant a like bond as is required in the fourth section of this act, or commit him to jail for failure to give such bond, and such defendant may be discharged from custody in the same manner as in the fifth section of this act provided.

Deft. not arrested, or escaped, trial to proceed in his absence, same as if present.

SEC. 9. If the defendant shall not have been arrested, or has escaped after arrest, such trial shall proceed in his absence, and if he be adjudged the father of such child, the justice shall transmit the papers and a transcript of such judgment, without delay, to the clerk of the circuit court of the proper county, who shall file and docket the same for trial—and such cause shall be heard and determined by such court in the same manner as if such defendant were present.

Filing of transcript lien upon real estate of deft. to extent of judgment afterwards rendered.

SEC. 10. The filing of such transcript as in the ninth section of this act provided, shall operate from the time of such filing, as a lien upon the real estate of the defendant to the extent of the judgment which may afterwards be rendered against him in such prosecution, and such judgment shall have the same effect and lien as if rendered at the time of such filing, and such lien shall be declared in such judgment.

Death of mother not to abate suit—name of child to be substituted—guardian ad litem appointed, &c.

SEC. 11. The death of the mother shall not abate such suit, if the child is living; but a suggestion of record of the fact shall be made, and the name of the child substituted in the proceedings for that of the mother, and a guardian *ad*

* The complainant in a case of bastardy, (the child being unborn,) may be asked on cross-examination, whether she had had sexual intercourse with any other person than the defendant, about the time when she said the child was begotten; but not whether she had had such intercourse at any other time.

In a case of bastardy the defendant cannot introduce evidence of his character. A witness for the defendant having stated on cross-examination that the defendant had always denied being the father of the child, was asked by the defendant to relate all he had heard him say about the matter. *Held*, that the question was improper. If the complainant's examination before the justice be not introduced in evidence in the circuit court, neither party can refer to it in argument. If there be a preponderance of evidence against the defendant he must be found guilty.—*Walker* vs. *The State*, 6 Blackf. 1.

† In prosecutions for bastardy, it must appear that the mother of the child was unmarried, and a resident of the State.—*Smith* vs. *The State*, 4 Blackf. 188.

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litem shall be appointed for that purpose, who shall not be liable for costs; and in such case, the testimony of the mother, taken in writing before the justice, may be read in evidence, and shall have the same force as if she were living, and had testified to the same in court.

Deft. not in custody, &c., and transcript has been filed, clerk shall issue warrant. Sheriff shall require bond as in sec. 4.

SEC. 12. When the defendant is not in custody, or under bond, and a transcript has been filed, as in the ninth section of this act required, the clerk of the circuit court shall issue to the sheriff of any county where such defendant may be alleged to be, a warrant for his apprehension; and such sheriff, if he arrest such defendant, shall require of him such bond as is in the fourth section of this act required; and on his failure to give the same, to the satisfaction of such sheriff, he shall commit him to the jail of the county where such trial is pending.*

Deft. denying charge, issue to be tried.

SEC. 13. If the defendant, in the circuit court, deny the charge, the issue shall be tried by the court or a jury.

Deft. found guilty, &c., to be charged with maintenance, &c.

SEC. 14. If such jury find that the defendant is the father of such child, or such defendant in court shall confess the same, he shall be adjudged the father of such child, and stand charged with the maintenance and education thereof.†

Court shall make order for payment of money for maintenance, &c.

SEC. 15. Such court shall, on such verdict and judgment, make such order as may seem just, for the securing such maintenance and education to such child, by the annual payment to such mother, or if she be dead, or an improper person to receive the same, to such other person as the court may direct, of such sums of money as may be adjudged proper, and shall render judgment for the same, specifying the terms of payment, and shall require of such defendant, if he be in custody, to replevy such judgment, by good freehold surety; or in default thereof, shall commit such defendant to jail until such security be given.‡

Shall require deft. to give surety, &c.

* If the defendant do not reside in the State, an order of publication may be made, on reasonable evidence of his non-residence.—*Hunter* vs. *The State*, 6 Blackf. 383.

To justify a judgment of the circuit court in such case, there must be a verdict against the defendant.—*Ibid.*

† If the defendant be discharged in a case of bastardy, it is too late for a motion on the part of the State to have the recognizance forfeited.—*State* vs. *Allen*, 4 Blackf. 269.

‡ An order by the court of filiation and basturdy may be enforced by *scire facias*, or on the order against the putative father, or on the recognizance against those who have entered into it, in the name of the State, on the relation of the party entitled.—*Harrington et al.* vs. *Ferguson*, 2 Blackf. 42.

The *scire facias* in such case, must show by what authority he has had the custody of the child, and why he is entitled to the benefit of the order for maintenance.—*Ibid.*

The order of the court, in a case of bastardy, after stating what sum the father must pay, should be, that the defendant pay the money to the person who shall maintain the child, or become entitled to the same by law; and that he enter into

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Bastardy—execution—dismissal of suit—limitation—death of child.

Execution, when to issue on judgment.

SEC. 16. Execution may issue on such judgments, whenever any amount is due on the same, and shall be executed, without any relief whatever from valuation or appraisement laws.*

Prosecuting witness may dismiss suit.

SEC. 17. The prosecuting witness may at any time before final judgment, dismiss such suit, if she shall enter of record an admission that provision for the maintenance of the child has been made to her satisfaction; such entry shall be a bar to all other prosecutions for the same cause and purpose.

Suit not to be brought after two years from birth.

SEC. 18. No prosecution under this act shall be instituted after two years from the birth of such bastard child.

Child dying, court may reduce amount to be paid.

SEC. 19. Upon the death of any bastard child, after judgment rendered as aforesaid, and before the expiration of the time limited for the last payment on such judgment, the court rendering such judgment may make such reduction in the amount of the same as may be rendered proper and just in consequence of such death.

recognizance, with one or more sureties, for the performance of the order.—*Dickerson* vs. *Gray*, 2 Blackf. 230.

The court should not, in ordering the father to make certain payments, in case of bastardy, direct an execution to issue, in case of non-payment. A *scire facias*, or an action of debt, may be maintained on such order by the party entitled to the money.—*Cooper* vs. *The State*, 4 Blackf. 316.

It will be presumed, the record not showing the contrary, that the justice, in a case of bastardy, did his duty. The judgment may be that the defendant pay the mother, for the support of the child, a certain sum *per annum*, for five years, &c.—*Beeman* vs. *State*, 5 Blackf. 165.

The mother of an illegitimate child is its natural guardian, and has a right to its custody. The mother gave her child to A., and afterwards married B. *Held*, that the gift did not deprive the mother before marriage, nor her and husband after marriage, of their right to the custody of the child during its infancy. The mother cannot be deprived of the guardianship of such child by the probate court, without notice.—*Dalton* vs. *State*, 6 Blackf. 357.

The judgment in case of a bastardy when the defendant did not appear, should be for a specified sum, with directions for its payment when collected, in such parts, and at such times, for the maintenance of the child, as the court shall think proper, and for costs.—*Hunter* vs. *The State*, 5 Blackf. 383.

Debt lies, in this State, on a judgment rendered in Ohio, against the father of a bastard child, charging him with a certain sum, payable by instalments, for the child's maintenance; but the declaration must show that the plaintiff had maintained the child, and thus entitled himself to the money.—*Stanfield et ux.* vs. *Fetters*, 7 Blackf. 558.

Damages for seduction, or expenses of lying-in, are not recoverable in prosecution for bastardy.—*Allen* vs. *The State*, 4 Blackf. 122.

The order of the court, in a case of bastardy, is, that the defendant pay the money adjudged for the maintenance of the child, to the person who shall support.—*Richards* vs. *State ex rel. Mauker*, 1 Carter's Ind. Rep., 53.

* A bond taken to secure a compliance with the order of the court, in a case of bastardy, reciting the conditions, is authorized by the statute of 1831, p. 286.—*Trimble et al.* vs. *State ex rel. S. Hobaugh*, 4 Blackf. 42.

If a suit be brought on such bond after the marriage of the mother, the judgment should be for the State on the relation of husband and wife.—*Ibid.*

If a declaration on such bond be demurred to, and the demurrer sustained, the judgment on demurrer should be interlocutory only; and the truth of the breaches, and amount of damages should be determined by a jury. After that, final judgment may be rendered for the penalty with costs, and execution be awarded.—*Ibid.*

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Bastardy—death of child—who to prosecute—action to survive—holding over.

Death of child not to bar prosecution.

SEC. 20. The death of a bastard child shall not be cause of abatement or bar to any prosecution for bastardy; but the court trying the same shall, on conviction, give judgment for such sum as shall be deemed just.

Prosecuting attorney shall prosecute.

SEC. 21. The several prosecuting attorneys within their respective circuits, shall prosecute all causes originating under this act.

Putative father dying, right of action shall survive; how to be prosecuted.

SEC. 22. In case of the death of the putative father of such child, either before or after the commencement of prosecution, and after the preliminary examination before the justice, the right of action shall survive, and may be prosecuted against the personal representatives of the deceased with like effect as if such father were living, except that no arrest of such personal representatives shall take place, or bond be required.

CHAPTER 4.

AN ACT concerning the unlawful detention of Lands and the recovery thereof.

[APPROVED MAY 13, 1852.]

Complaint.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever, in pursuance of legal notice, or otherwise, any landlord or his legal representative shall be entitled to possession of lands, he may, by himself or his agent, have any tenant who shall unlawfully hold over, removed from such lands, on complaint before a justice of the peace of the county in which such lands lie, specifying the matters relied on to justify such removal, and the damages claimed for detention, describing the premises with reasonable certainty.*

* To authorize a proceeding under the act of 1838 concerning tenants holding over, it must appear that the plaintiff is the landlord of the defendant, or that he claims under the landlord.—*Avery et al.* vs. *Smith*, 8 Blackf. 222.

A tenant may show that after the commencement of the tenancy, his landlord's title expired; but by becoming a tenant he admits that his landlord's title was good at the time the tenancy commenced, and neither the tenant nor any one claiming under him, can afterwards say the contrary.—*Doe d. King* vs. *Laman et al.*, 8 Blackf. 350.

The complaint in a case of forcible detainer must show that the land is within the county, and that the detainer is unlawful. The verdict for the complainant in such case must show that the premises are detained by force.—*Boxley et al.* vs. *Collins*, 4 Blackf. 320.

A writ of error lies from the judgment of the circuit court on appeal from the justices of the peace, in a case of forcible entry and detainer. To sustain a case

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Tenants holding over—summons—service—judgment—appeal.

Summons. SEC. 2. Such justice shall forthwith issue a summons, directed to a constable of such county, commanding him to summon such tenant to appear before him not less than five, nor more than ten days after the issuing thereof.

Service. SEC. 3. Such summons may be served on such tenant, or if he cannot be found, by delivering a copy thereof to some person of proper age and discretion, residing on the premises, or if no such person be found, by affixing a copy thereof on a conspicuous part of said premises.

Proceedings. SEC. 4. Subpœnas may be issued and served, the attendance of witnesses enforced, continuances granted, pleadings amended, juries empanneled and sworn at the request of either party, and challenges allowed as in civil cases before justices.

Proof of notice to quit. SEC. 5. Where notice to quit is required by law, a copy of the same with proof of service, shall be necessary to recovery by the plaintiff.

Judgment and writ of possession. SEC. 6. If the verdict of the jury, or the finding of the court be for the plaintiff, judgment shall be rendered thereon that he have possession of said premises; recover the damages assessed, and his costs; and if required by such plaintiff or agent, the justice shall issue a writ, directed to some constable of the county, commanding him to deliver said premises to said plaintiff, by removing the defendant and his goods therefrom, or otherwise, so that the plaintiff have complete possession thereof, and also to levy such damages and costs, of the goods of said defendant as might be done by virtue of a writ of *fieri facias*.

Service of writ. SEC. 7. Such writ as to delivery, shall be forthwith executed, and in other respects be governed by the laws regulating writs of *fieri facias*, issued by a justice in civil cases. And other writs of *fieri facias* may issue if necessary.

Judgment for defendant. SEC. 8. If the verdict of the jury or the finding of the court be for the defendant, he shall have judgment thereon for his costs.

Appeal. SEC. 9. An appeal shall lie to the circuit court or court of common pleas by either party, under the same regulations

of forcible entry and detainer, there must be proof that the premises are unlawfully detained, by force and violence. The complaint in such case showed that the plaintiff had bought the land of the defendant; that the latter, by agreement with the plaintiff, continued in possession until a day certain, and held over after that day by force and strong hand. Held, that the complaint was sufficient. Such proceeding may be supported, under the statute, without proof that the entry was unlawful.—*Barton* vs. *Osborne*, 6 Blackf. 145.

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and restrictions as in other cases before justices, and appeal-bonds securing damages, if any, and costs, and the prosecution of the appeal shall be given by the appellant.

Proceedings on appeal.

SEC. 10. The proceedings under such appeal shall be as in other appeals from a justice of the peace, and such appeal shall supersede proceedings in the justice's court; but if judgment before the justice shall have gone for the plaintiff, and the defendant appeal and his appeal be dismissed, the clerk shall certify such dismissal under his official seal to such justice, who shall issue process as if no appeal had been taken.

Damages.

SEC. 11. On the trial of any cause under this act, either before the justice of the peace or on appeal, the damages for the detention of the premises shall be estimated up to the time of each trial, while damages on appeal by the defendant shall be deemed as covered by the appeal-bond. *

Forcible entry and detainer.

SEC. 12. Any person who shall make unlawful or forcible entry into lands, and shall either peaceably or forcibly detain the same against any person having right to possession thereof, or any person having peaceably obtained the possession of lands, who shall unlawfully and forcibly keep the same, against any person having right to possession thereof, may be ousted from such premises, and the possession thereof restored to the person entitled to the same, and damages for

* The jurisdiction of the justices of the peace, under the act of 1838, concerning tenants holding over, is not limited as to amount of damages. 7 Blackf. 274. That statute only authorizes proceedings for the recovery of the possession of real estate, and damages for its detention. It has no relation to personal property.—*Ibid.*

T. filed a complaint before two justices of the peace against D. and I., as tenants of certain premises, for holding over, &c. The damages claimed were 100 dollars. Plea, not guilty. The following were the facts: The premises had been conveyed in fee simple by D. to T.; and by a sealed instrument of the same date with conveyance, executed by the plaintiff and defendants, the plaintiff, in consideration, &c., had "leased, rented, and to farm let" the premises to the defendants, from the date thereof until, &c., and had agreed to pay D. 100 dollars at the end of the term, "on the express condition," that the defendants should surrender the premises to him at or before that time, and had agreed also, that, should D. on or before that time, pay him a certain debt, &c., he would permit D. to remain in possession, and would release to him all his interest in the premises; and the defendants had agreed that they would use the premises in a husbandlike manner, would commit no waste, and would, at the end of the term, deliver possession to the plaintiff, if D., in the meantime should fail to pay him said debt. Held, that the claim of 100 dollars did not exceed the jurisdiction of the justices, and that the title to real estate was not involved in the cause. Held, also, that to maintain the suit it was not necessary that the plaintiff should have made an actual tender to D. of the 100 dollars. Held, also, that the agreement between the plaintiff and defendants, created between them the relation of lessor and lessees.—*Dougherty et al.* vs. *Thompson*, 7 Blackf. 277.

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retention recovered on complaint by him made, in the same manner as provided in the case of tenants holding over.*

* The complaint in an action of forcible entry and detainer, stated that the defendant with force and arms, unlawfully and forcibly entered upon the plaintiff's land (particularly described) and him, the plaintiff, did with force and arms, unlawfully put out of possession. Held, that this complaint could not be objected to after verdict, for not showing more particularly that the plaintiff had peaceable possession of the premises before the injury complained of. The verdict in the circuit court for the plaintiff on appeal, must, as in the trial before the justices, be signed by all the jurors.—*Test* vs. *Devers*, 2 Blackf. 80.

A. removed from a house and lot, leaving a few articles in the house and on the lot, and fastening the door. In the night of the second day afterwards, the door being proved to have been still fastened in the evening of that day, B. entered into the house, and put a tenant in possession, directing him to prevent every person, and A. particularly, from taking possession, and threatening to beat and prosecute any one who should enter into the premises. There was no direct proof, however, that B. broke open the door. On the complaint of A. against B for forcible entry and detainer, held, that the evidence would justify a finding against the defendant, as to the forcible entry; and that it was clear against him as to the forcible detainer, which, under the statute, entitled plaintiff to restitution.—*Evill* vs. *Conwell*, 2 Blackf. 133. See, also, 3 Blackf. 393.

CHAPTER 5.

AN ACT authorizing proceedings to try the right of property, seized by virtue of any writ of execution, or attachment, and claimed by any person other than the execution or attachment-defendant.

[APPROVED JUNE 10, 1852.]

Complaint, and proceedings thereon.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever any personal property shall have been seized by virtue of any writ of execution or attachment, and any person other than the defendant in such writ, shall file with the justice who issued such writ, or if the same be levied upon by more than one writ, with the justice who issued the oldest writ so levied, his complaint in writing, verified by affidavit, setting forth the fact of such levy, or seizure, and stating his claim to said property, and the nature of such claim, whether absolute or conditional, such justice shall docket such complaint for trial; and the same shall be tried and determined, and continuances granted, and changes

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of venue awarded, and all other proceedings had thereon as in other civil complaints before justices.*

Service of summons.

SEC. 2. A summons shall be issued and served, as in other cases; and the officer or officers, if there be more than one, holding such writs of execution or attachment, together with the plaintiffs in such writs, shall be named as defendants in such summons; but if such summons be returned that such plaintiffs in such writs of execution or attachment, or any of them, are not residents of the county, and the officer or officers named in such summons be served, such cause may be heard without service on such non-resident parties.

Continuance if not served.

SEC. 3. Unless such summons be served at least three days before the day set for trial, the defendant may claim a continuance at the cost of the plaintiff.

Proceedings to be suspended.

SEC. 4. From the time any such officer shall be notified by service of such summons of the pendency of such claim, he shall suspend all proceedings on the writs in his hands, so far as such property claimed is concerned, until such claim is determined.

*The claimant of goods, taken in execution against another person, filed a claim to the goods, stating them to be his, and that his claim was just and legal, and then made an affidavit that the claim was true in substance and matter of fact. Held, that the affidavit was sufficient.—*Hankins et al.* vs. *Ingols*, 4 Blackf. 35.

The execution-defendant, in a trial of the right of property between the claimant and execution-plaintiff, is a competent witness for the claimant.—*Ibid.*

See *Bradbury* vs. *Dougherty*, 7 Blackf. 467.

On a trial of the right of property taken in execution, the debtor's possession of the goods after his executing an absolute bill of sale to the claimant, may be shown by parol evidence not to be fraudulent.—*Foley et al.* vs. *Knight*, 4 Blackf. 420.

The affidavit and claim of a third person to property taken in execution, should show whether the claimant be the absolute owner, or whether his claim be conditional, whether it was created by deed or parol; but if the objection be not made before the justice, it is waived.—*Humble* vs. *Williams*, 4 Blackf. 473.

An execution was levied on certain goods found in the possession of the execution-debtor. A third person claimed the goods under a mortgage which had been previously executed to him in good faith by the execution-debtor, to secure the payment of a just debt. The possession of the goods was not provided for in the mortgage. At the time the mortgage was executed, the goods were delivered to the mortgagee, and were left by him with the execution-debtor, in whose possession they remained until the levy. Held, on a trial of the right of property, that the mortgagor's possession of the goods was not conclusive evidence of fraud as to creditors; but his possession might be explained by parol evidence, and shown to be fair and consistent with the contract.—*Watson et al.* vs. *Williams et al.*, 4 Blackf. 26.

The affidavit of a claimant of goods, taken in execution as the property of another, must show whether the claim is absolute or conditional; and, if it be conditional, whether it is by deed or parol.—*Norris* vs. *Detar*, 5 Blackf. 31.

In reckoning the time between the filing of the claim and trial, the day on which the claim was filed must be counted.—*Long et al.* vs. *McClure et al.*, 5 Blackf. 319.

There may be a trial of the right of property on which an execution has been levied, under the statute of 1838, regulating trials of the right of property, though the value of the goods exceed $100.—*Hanna* vs. *Stienberger et al.*, 6 Blackf. 520.

On a trial of the right of property in goods taken in execution, the claimant cannot recover unless he prove himself entitled to the immediate possession of the goods.—*Philbrick* vs. *Goodwin*, 7 Blackf. 18.

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Cause of action and pleas.

SEC. 5. No cause of action, other than the verified claim, required by the first section of this act, need be filed by the plaintiff, and no plea shall be required of the defendant, but all matters pertinent to the issue may be given in evidence by either party.

Jury.

SEC. 6. If either party demand a jury, the same shall be summoned, empanneled and sworn, as in other cases; if none be demanded, the justice shall try the cause.

Amendments.

SEC. 7. Amendments verified by affidavit may be made by the plaintiff in his complaint, either before the justice, or in the circuit court or court of common pleas, on appeal, on the same terms as to costs and continuances as plaintiffs in other complaints commenced before justices are permitted to amend.

Verdict.

SEC. 8. Such jury, in their verdict, shall assess the value of the property; but failure so to do, shall not vitiate their verdict. But if testimony as to such value has been given, and they omit such assessment, they shall receive no fees.

Appeal.

SEC. 9. An appeal shall lie to the circuit court or court of common pleas, if taken within ten days from the day of trial and not after, under the same rules and regulations, as to the taking thereof, and the trial in the circuit court or court of common pleas, as in other cases, the penalty of the bond being in double the value of the disputed property and accrued costs. *

SEC. 10. Until the time for such appeal has expired, the cause, so far as the disposition of such property is concerned, shall be considered as determined.

When damages assessed against the plaintiff.

SEC. 11. If the circuit court or court of common pleas determine against the claimant, they shall assess five per cent. in damages, in the value of such property, and render judgment therefor, in favor of the execution or attachment-plaintiffs.

Judgment to be conclusive.

SEC. 12. Any judgment determining the right of property in any proceeding under this act, shall be conclusive as to such right against all persons served with process or appearing in such cause. †

*One of the execution-plaintiffs in the case of a trial of the right of property in the goods levied on, prayed an appeal, the others saying they would proceed no further. On the appeal, the cause was decided against the claimant, no objection being made as to parties. Held, that there was no error.—*Holcomb* vs. *Johnson et al.*, 3 Blackf. 368.

A third person claimed property in goods, levied on by virtue of an attachment, and, on trial of the right of property, obtained a verdict. The creditor appealed, and the circuit court, on the claimant's motion, dismissed the suit, on the ground that the attachment had irregularly issued. Held, that the irregularity was no ground for dismissal.—*Tyner* vs. *Gapin*, 3 Blackf. 370.

†See *Chinn* vs. *Russel*, 2 Blackf. 172.

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Delivery-bond.

SEC. 13. The claimant of property in any proceeding under this act, shall, at any time pending such proceeding, be entitled to possession thereof, by executing bond and surety to the satisfaction of the justice or clerk of the court where the same is pending, in double the value of the property, which value shall be proved by the affidavit of a disinterested person; such bond shall be payable to the defendants in such complaint, and conditioned for the return of so much of the property seized as may be adjudged subject to the execution or attachment, to the officer or officers who have seized the same, if the plaintiff shall fail to obtain judgment.

When the claim is a lien.

SEC. 14. If the interest of the claimant in the property claimed, shall be found to be a lien, by mortgage or pledge, to secure any debt or liability due, or to become due, to him, the amount of such lien shall be ascertained by the finding and judgment in such cause; and such property shall be adjudged liable to be sold, subject to such lien; and the purchaser of such property, under such sale, so adjudged, shall take the same subject thereto, and to all the rights of the claimant by virtue of such lien as to his possession and other incidents. And such finding and judgment shall be conclusive as to the amount of such lien against the purchaser of said property, and the parties to such complaint.

Measure of damages.

SEC. 15. In any action on any bond given under this act, the measure of damages shall be the value of the property adjudged subject to execution, if it do not exceed the aggregate of all the judgments or claims in attachment it was seized to satisfy, or the amount of such judgments and claims if the value of the property exceed such aggregate, and all costs on such writs and in such complaint, to which in either case shall be added ten per cent. in damages on the amount.

Separate suits on bond.

SEC. 16. When two or more persons to whom any bond given under this act is made payable, have separate interests therein, they may maintain separate actions thereon, or may join in one action.

Sheriff may notify claimants.

SEC. 17. When any officer has seized any personal property by virtue of any execution or writ of attachment, and doubts whether some person, other than the execution or attachment-defendant is not the owner of, or has some claim to such property, he may give notice in writing to all such persons, that he has seized such property, describing the same, and stating by virtue of what process he has so seized it, and requiring such persons, if they have any claim or right thereto, to assert the same by law, within twenty days.

If the person notified fail to claim, he is not to recover.

SEC. 18. Any person notified as in the last preceding section, who shall not, within twenty days after receipt of such notice, if he be within the State, or forty days if he be with-

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out the State, when he receives the same, institute proceedings under this act, to try the right of such property, and prosecute the same to final judgment, with reasonable diligence, shall forever bar any action against such officer, or the purchaser of such property, on account of the same: *Provided, however*, that if, previous to the receipt of such notice, such claimant may have instituted any other suit to assert his right to such property, he may prosecute the same to final judgment.

CHAPTER 6.

AN ACT prescribing the powers and duties of Justices of the Peace in State Prosecutions.

[APPROVED MAY 29, 1852.]

Jurisdiction in State prosecutions.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That the jurisdiction of justices of the peace in State prosecutions, shall be co-extensive with their respective counties.

Justice shall issue warrants for arrest.

SEC. 2. Any justice, shall on complaint made on oath before him, charging any person with the commission of any crime or misdemeanor, issue his warrant for the arrest of such person, and cause him to be brought forthwith before him for trial or examination.

Original, exclusive and concurrent jurisdiction.

SEC. 3. Justices shall have exclusive original jurisdiction in all cases where the fine assessed cannot exceed three dollars, and concurrent jurisdiction with the court of common pleas to try and determine all cases punishable by fine only, or by fine with discretion to imprison, and jurisdiction to make examinations in all other cases, and in trials before justices fines to the extent of twenty-five dollars may be assessed; but they shall have no power to adjudge imprisonment as a part of their sentence, except as in this act specially provided.

May order arrest without warrant.

SEC. 4. Where any offense is committed in view of any justice, he may by verbal direction to any constable, or if no constable be present, to any citizen, cause such constable or citizen to arrest such offender, and keep him in custody for the space of one hour, unless such offender shall sooner be taken from such custody, by virtue of a warrant issued on complaint on oath. But such person so arrested shall not be confined in jail, nor put upon any trial, until arrested by virtue of such warrant.

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Docketing and hearing of causes.

SEC. 5. On the return of any warrant issued by him, it shall be the duty of the justice to docket the cause as in civil cases, and unless continuance be granted forthwith, to hear the cause, and either acquit, convict and punish, or hold to bail the offender, if the offense be bailable, or in default of bail, or if the offense be not bailable, commit him to jail, as the facts and the law may justify.

Trial; jury may be empanneled.

SEC. 6. Whenever the offense charged is one that the justice has jurisdiction to punish, the prisoner or the State may demand a jury, which may be empanneled and sworn as in civil cases, or he may be tried by the justice.

Judgment or verdict; bail for appearance, or commitment

SEC. 7. Such justice or jury, if they find the prisoner guilty, shall assess his punishment; or if in their opinion, the punishment they are authorized to assess is not adequate to the offense, they may so find, and in such case the justice shall hold such prisoner to bail for his appearance before the proper court, or commit him to jail in default of such bail.

Recognizance of witnesses.

SEC. 8. Whenever any justice shall hold any prisoner to bail, or commit him to jail in default of bail, he shall also recognize (with or without surety in his discretion) such witnesses as he may deem important to appear and testify before the court where such cause is next to be heard.

Recognizance for felony, to cir court: for misdemeanor, to court com. pleas.

SEC. 9. When the offense for which a party is held to bail is a felony, he shall be recognized to appear at the next term of the circuit court of the county; if the offense is a misdemeanor, he shall be recognized to appear at the next term of the court of common pleas of the county.

Prisoner may appeal.

SEC. 10. Any prisoner against whom any punishment is adjudged, may appeal to the court of common pleas of the county at any time within thirty days after trial, on entering into recognizance for his appearance at the next term of such court, as in other cases; and such appeal shall stay all proceedings.

Recognizance—surety upon.

SEC. 11. Recognizances for the appearance of prisoners, shall in all cases be taken with freehold surety, and shall be substantially in the following form:

Form.

We, A. B——— and C. D———, severally acknowledge ourselves bound to the State of Indiana in the sum of ——— dollars each, if the said A. B——— shall not appear at the first day of the next term of (here specify the court) to answer a charge of (here state the offense) at the county of ——— and State of Indiana; and abide the judgment of such court.

Witness our hands and seals this —— of——— 18——.

A. B. [SEAL.]
C. D. [SEAL.]

Test: RICHARD STILES, *Justice.*

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Recognisance and transcript to be filed by justice; clerk to docket cause, &c.

SEC. 12. Such recognizance, together with a transcript of the proceedings, and all papers in the case, shall be forthwith filed by the justice with the clerk of the circuit [or common pleas] court, who shall docket such cause for trial, and record such recognizance forthwith on the order book of such court, and enter the same on the judgment docket; and from the date of such entry it shall operate as a lien upon all lands in the county of the parties thereto; and any judgment afterwards had upon it, shall have relation back to the date of such entry.

Continuance—costs of.

SEC. 13. Continuances may be granted, either on the application of the prisoner, or the prosecuting attorney or prosecuting witness, under the same rules as in civil cases; except that the costs of such continuance shall abide the event of the prosecution in all cases.

Prisoner held to bail, witnesses recognised, in case of continuance.

SEC. 14. Whenever such trial is continued, the justice shall hold the prisoner to bail for his appearance, or commit him to jail in default thereof; and shall recognize the witnesses in the same manner as prisoners are held to bail or witnesses recognized for their appearance at the circuit or other court.

Certificate of forfeiture, and filing of recognisance, and record thereof.

SEC. 15. On the forfeiture of any recognizance taken by virtue of the last preceding section, the justice shall indorse thereon his certificate, stating in substance, that such prisoner did not appear in discharge of such recognizance, and abide the judgment of the court; and shall forthwith file such recognizance, so indorsed, with the clerk of the circuit court, if the offense charged was a felony; or with the clerk of the court of common pleas, if the offense charged was a misdemeanor; and such clerk shall forthwith record in the order book of his court, such recognizance and certificate of forfeiture, and note the same on the judgment-docket and such record shall have the same force and effect as other recognizances; and such certificate, or the record thereof, shall be presumptive evidence of the forfeiture of such recognizance.

Special constables.

SEC. 16. Special constables may be appointed under like circumstances, and such appointment impose like liabilities, as in civil cases.

Change of venue—recognisance in case of.

SEC. 17. Changes of venue shall be granted on the application of the prisoner, as in civil cases, but the cost thereof shall abide the event of the prosecution, and in such case, the justice granting the change, shall fix the time of trial before the justice to whom he may send the cause; and the prisoners and witnesses shall be recognized to appear before the justice to whom the case is sent, in the same manner as provided in cases of continuances; and such recognizance, if forfeited, shall be certified by the justice taking such forfeiture, in the same manner as in cases of continuances, and with like effect.

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Judgment—replevy of.

SEC. 18. Whenever judgment shall be rendered for a fine, it shall be a part of such judgment that the defendant stand committed until such fine be paid or replevied; and the defendant may replevy such judgment for ninety days, in the same manner as in civil cases, and such replevy shall have the force and effect of a like undertaking in civil cases.

Deft. not paying, &c., shall be committed.

SEC. 19. If such defendant do not immediately pay or replevy the same, the justice shall commit him to jail, there to remain one day for each dollar of such fine so adjudged against him: *Provided*, that no female shall be imprisoned.

Search warrants.

SEC. 20. Search warrants may be issued, by justices, on complaint on oath, charging stolen goods to be, as the affiant believes, concealed in any place, and particularly describing such place, and the goods alleged to be stolen; and such warrant shall authorize the officer serving the same, to seize such goods and bring them before the justice, to be by him kept until their ownership is determined by law.

Duty of justice to pay over money, &c.; to make statement &c.

SEC. 21. It shall be the duty of every justice, on the first Mondays in January and July in each year, and on going out of office, to pay over to the treasurer of his county all money he may have received on account of fines, and all fees which may have remained unclaimed in his hands for twelve months, for the use of common schools, and he shall, at the same time, deliver to such treasurer a statement, in writing, showing by items the sources from which such money was derived; and shall append thereto an affidavit, that he has received no other money for fines, not before paid over to such treasurer, and has no other fees unclaimed for twelve months in his hands; and the treasurer's receipt therefor he shall file with the auditor, who shall give him a quietus.

Surety of the Peace.

Affidavit for surety of the peace.

SEC. 22. Upon affidavit by any person, that he has just cause to fear, and does fear, that another will destroy or injure his property, or injure, by violence, himself or some member of his family; and that he makes such affidavit only to secure the protection of the law, and not from anger or malice; any justice, with whom such affidavit is filed, shall issue his warrant and cause the person complained of to be arrested and brought before him for trial.

Trial upon peace warrant.

SEC. 23. The issue to be tried in such case, shall be, whether the complaining witness has just cause to entertain the fears expressed in his affidavit; which issue shall be tried by the justice, unless either party shall demand a jury; and changes of venue and continuances shall be granted as in other cases.

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Justice's court—surety of the peace.

Recognizance to keep the peace.

SEC. 24. If the justice or jury trying the issue shall find that the complaining witness has just grounds to entertain the fears expressed in his affidavit, the justice shall require of the defendant recognizance and freehold surety, in a sum not less than fifty, or more than five hundred dollars, for his appearance on the first day of the next term of the court of common pleas, and to keep the peace meanwhile; which recognizance shall be substantially in the following form:

Form.

We, A. B. and C. D., severally acknowledge ourselves bound to the State of Indiana, in the penal sum of ——— dollars each, if said A. B. shall not appear at the first day of the next term of the court of common pleas of ——— county, to answer a complaint of surety of the peace made against him by John Smith, and abide the order of such court therein; and in the meantime keep the peace toward all the inhabitants of this State.

A. B. [SEAL.]
C. D. [SEAL.]

Attest: RICHARD STILES, *Justice.*

Recognizance and transcript to be filed.

SEC. 25. Such recognizance shall be filed and recorded in the same manner and have the same force and effect of recognizances required to be taken in criminal cases by justices. And such justice shall also file in the clerk's office a transcript of the proceedings before him and all papers in the cause, unless otherwise directed by both parties.

Docketing and trial of cause—finding of court or jury.

SEC. 26. Such cause shall be docketed and tried in the court of common pleas under the rules governing such trials before justices; and, if the finding of the court, or the verdict of the jury, be against the defendant on the issue, such court shall require of such defendant recognizance and surety that he will keep the peace for such length of time as the court may direct, and shall also give judgment against him for costs, and that he stand committed until the same be paid or replevied.

Costs, when against complainant.

SEC 27. If the verdict or finding, either before the justice or in the court of common pleas be in favor of the defendant or the cause be dismissed by the complaining witness, or he fail to prosecute the same, all costs shall be adjudged against the complaining witness.

Complainant and wife competent witnesses.

SEC. 28. Such complaining witness and his wife, shall be competent witnesses. But such wife shall not be sworn in such case without the consent of her husband.

Surety of peace; wife against husband.

SEC. 29. The wife may pray surety of the peace against her husband, or any other person may pray such surety in her behalf against him, and such person shall, on such proceeding be deemed the complaining witness.

Deft. failing to give recognizance to be committed.

SEC. 30. When any defendant shall fail to enter into any recognizance, and sureties required of him, by any justice or

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court of common pleas as above required; such court or justice shall commit such defendant to the county jail, until he shall be discharged in due course of law.

Forms. SEC. 31. Justices shall use substantially the following forms, with such variations as the circumstances of each case may require:

Affidavit for Warrant.

Affidavit for warrant. State of Indiana, county of ———, ss.

A——— B——— swears (or affirms as the case may be) that on or about the ——— day of ———, 18—, at said county, C——— D——— as affiant verily believes, (here state the offense.) A—— B——.

Subscribed and sworn before me, this —— day of ——, 18—.

RICHARD STILES, *Justice.* [SEAL.]

State Warrant.

State warrant. State of Indiana, county of ———, ss.

To any Constable of ——— county:

You are commanded to arrest C——— D——— and bring him forthwith before me, at my office, to answer the charge of having, at said county on or about the ——— of ———, 18—, (here state the offense,) as A——— B——— has complained on oath, and have then and there this writ.

Dated this ——— of ———, 18—.

RICHARD STILES, *Justice.* [SEAL.]

Affidavit for Search Warrant.

Affidavit for search warrant. The State of Indiana; county of ——— ss:

A. B——— swears, [or affirms. as the case may be,] that he verily believes that, [here describe the property,] of the value of ——— dollars, the property of said affiant, and heretofore feloniously stolen from him, is concealed in or about the dwelling house of C. D———, situated in the township of Charlestown in said county. A—— B——.

Subscribed and sworn to before me this —— day of —— 18——.

RICHARD STILES, *Justice.* [SEAL.]

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Search Warrant.

The State of Indiana, county of ———ss:
To any constable of ——— county:

Search warrant

Whereas, A—— B—— has filed with me his complaint on oath, that he verily believes that, [here describe the property], of the value of —— dollars, the property of the said A—— B——, heretofore feloniously stolen from him, is concealed in or about the dwelling house of C—— D——, situate in the township of Charlestown, and county aforesaid: you are therefore commanded to search such dwelling house, and if such property be found, bring the same forthwith before me, at my office, to be disposed of according to law.

Dated, this ——— of ——— 18——.

RICHARD STILES, *Justice.* [SEAL.]

Affiduvit for Surety of the Peace.

State of Indiana, county of ——— ss:

Affidavit for surety of the peace.

A—— B—— swears, [or affirms, as the case may be,] that he has just cause to fear, and does fear, that C—— D——, [here describe the injury apprehended,] and that he makes this affidavit, only to secure the protection of the law, and not from anger or malice.

A—— B——.

Subscribed and sworn to before me this —— of —— 18——.

RICHARD STILES, *Justice.* [SEAL.]

Warrant on Complaint for Surety of the Peace.

The State of Indiana, county of ——— ss:
To any constable of ——— county;

Warrant on complaint for surety of the peace.

Whereas, A—— B—— has filed with me his affidavit that he has just cause to fear, and does fear, that C—— D——, [here insert the injury apprehended, as specified in the affidavit,] and that he makes said affidavit, only to secure the protection of the law, and not from malice or anger; you are therefore commanded forthwith to arrest said C—— D——, and bring him before me, at my office to be dealt with according to law, and have then and there this writ.

Dated, this ——— of ——— 18——.

RICHARD STILES, *Justice.* [SEAL.]

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Commitment to Jail.

Commitment to jail.

The State of Indiana, ——— county, ss:

To the jailor of ——— county;

Whereas, C—— D—— has been arrested and tried before me, and adjudged guilty of, [here state the offense,] at such county, and having failed to find bail in the sum of ——— dollars, as required by me for his appearance at the next term of the circuit court, to answer such charge; you are therefore commanded to confine him in the county jail, until discharged by law.

Dated, this ——— of ——— 18——.

RICHARD STILES, *Justice.* [SEAL.]

If the offense is not bailable, all that portion relative to the failure to find bail, may be omitted.

Commitment for failure to pay or replevy fine or costs.

Commitment for failure to pay or replevy fine or costs.

The State of Indiana, county of ———, ss:

To the jailor of ——— county;

Whereas, C—— D—— has been tried before me and adjudged guilty of, [here state the offense,] and by me fined in the sum of ——— dollars and judgment thereon rendered for such sum, together with costs taxed at ——— dollars; and said C—— D—— not having paid or replevied such judgment; you are therefore commanded to confine him in the county jail for the space of —— days, unless sooner discharged according to law.

Dated, this ——— of ——— 18——.

RICHARD STILES, *Justice.* [SEAL.]

CHAPTER 7.

AN ACT prescribing certain misdemeanors punishable only by a Justice of the Peace.

[APPROVED JUNE 7, 1852.]

Penalty for assault.

Be it enacted by the General Assembly of the State of Indiana: SECTION 1. Every person who shall unlawfully assault another, shall be fined not exceeding three dollars. *

*A common assault is not an indictable offense.—*State* vs. *Harlstock*, 2 Blackf. 257.

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Justice's court—exclusive jurisdiction—destruction of records.

For selling liquors on Sunday.

SEC. 2. Every person who shall barter or sell any spirituous or intoxicating liquors on Sunday, except in cases of sickness, upon conviction, shall be fined not exceeding three dollars.

For running horses and shooting in town.

SEC. 3. Any person who shall run horses or shoot at a mark within the limits of any town or village, or along or across any street thereof, upon conviction, shall be fined not exceeding three dollars.

For letting stallions to mares, &c., in town, &c.

SEC. 5. Any person who shall permit to run at large at any place, or who shall keep or let to mares or jennets, within the limits of any city town or village, or within two hundred yards thereof, any stallion or jack, except within an enclosure by which the view of the inhabitants of such city, town, village or vicinity thereof, is obstructed, shall be fined three dollars for every day such offense is committed.

Foregoing offenses punishable only by a justice.

SEC. 6. The offenses enumerated in this act, shall be punishable only by a justice of the peace, except in cases of appeal and conviction in a higher court.

ADDENDUM.

CHAPTER 8.

AN ACT to provide against the consequences ensuing or likely to ensue from the destruction of books, pamphlets, papers, records, or other writings of any county in this State, or of any circuit, probate, commissioners' or other inferior court of record therein, or filed with or in the legal custody of any officer of any county in this State, and to provide for the perpetuation of testimony relative to the same; and requiring new official bonds to be given in cases where the bonds of officers, executors, administrators and guardians have been destroyed.*

[APPROVED JANUARY 12, 1852.]

Auditor to notify county coms. in case of destruction of records, &c.

SECTION 1. *Be it enacted by the General Assembly of the State of Indiana*, That whenever there has been, or shall be destroyed, all or any of the books, pamphlets, papers, records, or other writings, belonging to any county in this State, or of any court of record held therein, it shall be the duty of the auditor of such county forthwith thereafter to notify the members of the board of commissioners of such county, to meet at such time and place as he shall designate, and they shall so meet accordingly; and may, during the twelve months from thence next ensuing, meet from time to time on their

* According to the order adopted in the publication of these statutes, this act should have appeared in the 1st volume.

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own adjournments, if such meetings shall in their opinion be rendered necessary, by the destruction of the records as aforesaid.

List of records, books, &c., to be made out and certified to Gov.

SEC. 2. Such board, when so met, shall, on proof made before them, cause to be made out and certified by the auditor of such county, a list of all books, pamphlets, documents, records, maps, and other papers, whether written or printed, which have been so destroyed, which had before such time been furnished such county by the State government by virtue of any law or joint resolution of this State, which certified list such auditor shall forthwith forward to the Governor of the State.

Governor to notify proper officer to forward books, &c.

SEC. 3. It shall be the duty of the Governor, immediately on the receipt of said certified list, to notify the officer or officers of State, whose duty it may be to furnish to the counties pamphlets, books, documents, maps, records, and other papers, whether written or printed, of the fact of such destruction; and it shall be the duty of such officer or officers immediately thereafter to furnish to such county all such pamphlets, books, documents, maps, records, and other papers, whether written or printed, as may be so certified to have been destroyed, in the same manner as if such county had never received the same.

Recorder to procure book, and record deeds therein. Force and effect thereof.

SEC. 4. If the records required to be kept in the recorder's office of any county in this State have been or shall be destroyed in whole or in part, it shall be the duty of such recorder forthwith thereafter to procure a book or books, in which he shall from time to time, and in the order in which they may be presented, record such deeds and other instruments of writing as had been previously recorded in such office, and the record whereof has been destroyed; and he shall also immediately after the record of such deed or other instrument record the indorsement thereon made by the recorder, of the time when said deed was originally filed in such office for record; and such record shall have the same force and effect as the original record would have had if the same had not been destroyed.

Recorder to procure another book and record proof of lost deed therein — make indexes, &c.

SEC. 5. Such recorder shall also procure another book or books in which he shall record, in the order in which the same may be presented to him, all such proof of the execution, acknowledgment, contents, destruction, and recording of any deed or other instrument before that time recorded in such office, the record whereof has been destroyed, as may be made before him in the manner hereinafter prescribed; which said book or books, together with the book or books required in the last preceding section, shall be by such recorder indexed in the same manner as records of deeds may at such time be required to be indexed by existing laws.

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Destruction of records, books, pamphlets, maps, &c.

Perpetuating instrument of writing, the record of which is destroyed.

SEC. 6. Whenever any person having an interest in perpetuating the evidence of any deed or other instrument in writing, proper to be recorded, the record whereof in such office has been destroyed, will make oath before such recorder that he has such interest,—that such deed or other instrument has been previously recorded in such office, and that though he has made diligent search for the original of such deed or other instrument, he has been unable to find the same, such recorder shall at the instance of such person, after first recording such oath, and causing such affiant to sign such record, proceed to take such proof under oath as may be produced before him, recording the same in such book, and causing the witnesses to sign such record, to which he shall also add his certificate of their having been duly sworn in the premises.

Proof, what to consist of.

SEC. 7. Such proof shall consist of evidence of the deed and execution and acknowledgment of such deed or other instrument—of the date and contents of the same,—of the fact that the same had been previously recorded in such office, and the time when it was so recorded, or deposited for record, as nearly as the witness or witnesses may be able to state. But such recorder, before examining any witness, shall require him to state on oath, that he has no interest direct or indirect in perpetuating such testimony, which statement shall be incorporated in such record. Such recorder shall be authorized to administer all oaths required by this and the last preceding section of this act, and may himself be sworn as a witness by any person authorized to administer oaths.

Effect of such record when used in evidence in a court.

SEC. 8. In all suits in any court in this State, it shall be competent for either party to read in evidence such record of testimony, or a copy thereof, certified by the recorder of such county, to be a full copy of all the testimony relative to such deed as it may have relation to, as may be contained in such record; and such record, or such copy thereof, when so read in evidence, shall have the same force and effect as if the witness or witnesses had been sworn to the same facts on the trial of such cause,—and may be excluded, rebutted or impeached, in the same manner that such testimony might have been excluded, rebutted or impeached, if sworn to by such witness or witnesses on such trial.

In case record, &c., of circuit court destroyed, board to appoint commissioner.

SEC. 9. If the records or files of the circuit, probate, commissioners', or other inferior court of record in any county in this State, or the papers on file in the office of the clerks of either of such courts, or the bonds, notes, or other papers belonging to, or properly filed in, the office of the treasurer, auditor, assessor or other officer of any county in this State, or any or either of them, have been, or shall be in whole or in part destroyed, the board of commissioners, when they shall have met as is in the first section of this act required, shall appoint a commissioner, who, after having taken an oath of

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office as such commissioner, shall forthwith proceed to discharge the duties hereinafter required of him.

Commissioner may employ a clerk.

SEC. 10. The said commissioner may, if he deems the same necessary, employ a clerk; and such clerk, before entering upon the discharge of his duties, shall take an oath of office.

Commissioner's duties.

Such commissioner shall also procure a sufficient number of substantial record books, in which shall be recorded at length the proceedings had before such commissioner hereinafter authorized, keeping in separate books the record of business appertaining to the different courts, and the offices of the different officers of such county. Such commissioner shall have power to administer oaths in all cases where testimony is required to be taken before him.

Board may dismiss, or after a year, require him to report.

SEC. 11. If the board of commissioners of such county shall at any time become satisfied that such commissioner is incompetent, or unreasonably delays or neglects the duties devolved upon him by this act, they may, by order of record, remove him from such office, and appoint a successor, and from such order of removal there shall be allowed no appeal. And such board of commissioners may, at any time after twelve months from the time when such commissioner enters upon the duties of his office, require him, within twenty days thereafter, to close up the business of his commission; after the expiration of which twenty days the duties of his office shall cease. But such board of commissioners may at any time thereafter authorize a resumption of said duties for a limited period.

Commissioner to give notice of appointment.

SEC. 12. Such commissioner, before entering upon the duties of his office, shall give twenty days' notice of his appointment, and of the time and place when and where he will commence discharging such duties, by publication in some newspaper of general circulation, printed and published in such county, if there be one, and by posting up written notices in each of the townships of such county.

May adjourn, &c.

Such commissioner may adjourn from time to time, as the business before him may require; but after an adjournment without day, he shall not again resume the duties of such office without an order of the board of commissioners of such county shall authorize him so to do.

Powers of commissioner.

SEC. 13. Such commissioner shall have power to administer all oaths necessary and proper to be taken before him,—to issue subpœnas for witnesses, and compel their attendance by attachment,—punish contempts by fine, and issue execution therefor,—tax costs, and issue fee bills therefor; and such writs and subpœnas shall be served by the sheriffs of the several counties in this State, who, together with witnesses, shall receive therefor the same compensation which may be allowed by law for the same service or attendance in the circuit court, to be taxed against the party making such cost.

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Destruction of records, books, pamphlets, maps, &c.

Commissioner to enter of record proof, &c.

SEC. 14. Such clerk, or if no clerk be appointed, such commissioner, shall enter of record such proof by disinterested witnesses as may be produced before him, of the existence and contents of any record, (judgments and decrees, and writs of execution and returns thereof, recognizances and forfeitures thereof, in courts of record, excepted,) bond, note or other document or written paper whatever, which belonged to or was properly filed or deposited in the office of the clerk of the circuit, probate, commissioners' or other inferior court of record in such county which has been or may be destroyed: *Provided, however*, that no proof of the contents of any will shall be received until the commissioner is satisfied, by the oath of the person seeking to have the same recorded, or other satisfactory evidence, that neither the original nor an authenticated copy of the same can be produced.

Testimony to be set out at length.

SEC. 15. Such commissioner, and such recorder, in making entries of the testimony taken before them, shall set out a length the statements of the witness or witnesses, and not the conclusions drawn by such commissioner or recorder from such statements.

Record to be signed by commissioner.

SEC. 16. Such records shall be signed by such commissioner from day to day, and at the close of each volume he shall certify the same to be true and full copies of the testimony taken before him, and shall deposit such volumes, as fast as they are completed, in the different offices to which their contents respectively appertain. Such records, or properly certified copies thereof, may be read in evidence in any legal proceeding in this State, and shall have the same force and effect that the same testimony would have had if delivered orally in court.

Evidence thereof.

Copies to have same force as original.

SEC. 17. Copies of such records, or any part thereof, may be certified as true and full copies of all testimony taken on the subject-matter to which such part relates, by such commissioner while such volume remains in his custody, and by the officers with whom the same may be properly deposited after such deposit, and shall have the same force and effect in evidence as the original of which they are copies.

Compensation of commissioner and clerk.

SEC. 18. Such commissioner shall, if he employ a clerk, be entitled to receive as compensation, a sum to be allowed by the board of commissioners, not exceeding three dollars per day for the time actually employed; and if he acts as his own clerk, a like compensation of not exceeding four dollars per day. Such clerk, if one be employed, shall be paid not exceeding two dollars per day. The recorder of any such county shall be entitled to charge half the usual fees for recording, to be paid by the person for whom the same is done. All expenses of books, stationery and per diem, shall be paid by such county.

Copy of wills, &c.

SEC. 19. Whenever an authenticated copy of any will or letters testamentary or of administration, the record whereof

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has been destroyed, shall be produced to the clerk of the proper court, he shall record the same in the same manner as if it was the original, and shall note upon the record the date at which it was originally recorded; which last record shall have the same force and effect the original record would have had if the same had not been destroyed.

Judgment, decree, &c., how reinstated.

SEC. 20. Any circuit, probate, or other inferior court of record, held in any county in this State, the records whereof have been or may be destroyed in whole or in part, may in term time, or at a special term or terms held by the judge thereof, in his discretion, the holding of which term or terms is hereby authorized, on motion, cause to be reinstated on the record any judgment or decree, or record of the issue and return of any writ of execution or order of sale, or any restraining or other interlocutory order or decree, before that time made or rendered in said court, or any recognizance or other undertaking of record, the record whereof has been destroyed.

Notice to defendants.

SEC. 21. The defendants or their legal representatives, in all cases mentioned in the last preceding section, shall have ten days' notice in writing of the intention of the plaintiff or complainant to make such motion; or if such defendant be a non-resident of the State, or his residence unknown, such notice may be given by three weeks' publication in some weekly newspaper of general circulation, printed and published in such county, or if none be printed and published in such county, then in such paper in the State, nearest to the county seat of such county: such published notice to be given by the clerk of such court on affidavit filed by some disinterested affiant.

Proceeding in the trial of the application.

SEC. 22. Such defendant may resist such motion by plea of *nul tiel record*, and no other, which shall be tried by the court, and upon such trial oral testimony shall be admitted; but strict proof of sums and dates shall not be required on the trial of such issue. If the defendant appear to such motion, or has had actual notice thereof, such judgment, decree, or other record shall, when so reinstated of record, have the same force and effect that the original judgment, decree or other record would have had, if the same had not been destroyed.

Fees, &c.

Upon the re-entry of judgments in the circuit or probate court, and in all other cases where fees are due and unpaid, it shall be the duty of the clerk of said court to re-tax the fees due in said cases, or in other cases, previous to, and not connected with, said re-entry; which said taxation shall be either of the aggregate amount due each officer, or by itemizing the same, as the same may be known to said clerk, or furnished to him by the officer claiming the same. Nevertheless, the person or persons against whom the fees are thus taxed, may move

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in the proper court to have the same re-taxed according to the law and practice governing that subject; and the said officers shall have the same remedy to collect the said fees so taxed as the general laws provide for the collection of other fees; or said officers may each be allowed the actions of debt or assumpsit for the collection of the same in the same manner that other debts are now collected by law.

When to have reinstatement set aside.

SEC. 23. In all cases when such judgments, decrees, executions, and records of the issue and return thereof, or recognizances and forfeitures thereof, shall be reinstated of record without appearance of or actual notice to the defendant, such defendant may at any time within two years thereafter, on affidavit of merits, have the same set aside on motion, of which notice the plaintiff or complainant shall have the same notice required to be given to the defendant by the eighteenth [twenty-first] section of this act. Whenever such reinstatement shall be so set aside, the same proceedings shall be had thereon as if the defendant had appeared to the original notice.

Guardians, &c., to file new bonds.

SEC. 24. All guardians, administrators and executors, whose official bonds have been or may be destroyed in any general or notorious destruction of the records of any county in this State, shall within three months thereafter file new bonds to the acceptance of the proper officer; or failing so to do, they shall cease to be such guardians, executors or administrators, and the proper court shall appoint a successor. The liability on such new bond shall commence from the time of filing the same in the proper office; and the sureties in the bond destroyed shall not be liable for any default or miscarriage of their principal occurring after such new bond has been filed.

County officers to file new bonds.

SEC. 25. All county officers from whom, by law, an official bond is required, shall, upon the destruction of any such bond, file with the proper officer a new bond within twenty days after they shall be notified of such destruction by written notice over the hand of the officer having the custody of the bond destroyed, or failing so to do, or to resign such office, shall be fined before any justice of such county ten dollars for every day they shall fail so to do; and the liabilities on such new or old bond respectively shall be the same as is provided in the twenty-first section of this act on like bonds given by guardians, executors and administrators.

Treasurer's books to be made out by auditor.

SEC. 26. If the precept and duplicate, or either of them, or any other public paper or papers in the hands of the treasurer of any county in this State, has been or shall be in whole or in part destroyed, it shall be the duty of the county auditor of such county, or other officer whose duty it may be to furnish such papers, forthwith thereafter to replace the same in his hands by making out anew all such books and papers as

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have been destroyed, in the same manner and from the same original as the books and papers destroyed were made out; which precept, duplicate and other books and papers, when so made out and placed in the hands of such treasurer, shall have the same force and effect as if they were identical papers which had been destroyed.

Persons required to pay taxes assessed on such duplicate.

SEC. 27. All persons charged with taxes on such duplicate made out as in the last preceding section is required, shall be liable to pay the same, unless such person shall produce a proper receipt for the same, or shall satisfy, by competent proof, such treasurer, or the board of commissioners of such county, that he has paid the same.

Assessments and appraisements to be made out.

SEC. 28. Whenever in any county both the assessment rolls and duplicates shall be destroyed, the board of commissioners of such county shall cause new assessments and appraisements to be made out, in the same manner and under the same regulations that the original assessments and appraisements were made—and all such proceedings shall be thereafter had as may be necessary and proper under existing laws, to enable the treasurer to collect all taxes due in such county.

Emergency.

SEC. 29. It is declared that an emergency exists requiring the immediate taking effect of this act, and the same is hereby declared to be in force from and after its passage.

Sec'y of State to forward copy of act, when.

SEC. 30. If at any time before the publication and distribution of the general laws of the present General Assembly, the Secretary of State shall be informed that the records or any part thereof of any county in this State, have been in whole or in part destroyed, it shall be his duty forthwith to forward to the clerk of the circuit court of such county an authenticated copy of this act, and such clerk shall file the same in his office, and shall furnish the board of commissioners of such county with a copy thereof for the use of the commissioners herein provided for.

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APPENDIX.

EXPLANATIONS

OF

TECHNICAL TERMS AND PHRASES

USED IN THE LAWS.

Administrator de bonis non. Administrator of the goods not administered by a deceased executor or administrator.

Ad quod damnum. To what damages; a writ to assess damages for obstructing water courses, etc.

Alias. Otherwise; a second writ when the first is not served.

Aliter. Otherwise.

Animus furandi. In law, an intention to steal.

Bona fide. In good faith.

Capias ad respondendum (capias.) A writ commanding that the body of the defendant be taken to answer to the action.

Capias ad satisfaciendum, (ca. sa.) A writ commanding that the body of the defendant be taken in execution to satisfy the judgment.

Cepi corpus. A return to a capias writ that the body is taken.

Certiorari. A writ to an inferior court, commanding that the proceedings in a cause be certified to a superior court.

Cestui que trust. He for whom the trust is; the person for whose benefit a trustee holds an estate.

Choses in action. Things in action, as bonds, notes, etc.

De bene esse. Conditionally.

De novo. Anew. A *venire de novo* is awarded when a new trial is granted after a verdict.

Dedimus potestatum. A commission usually sent by a court to some individual or judicial officer, authorizing him to take and transmit testimony.

De facto. In fact; as contra-distinguished from *de jure*, of right.

Demurrer. Is an issue of law to be tried by the court.

Distress infinite. A writ commanding the property of a person to be distrained until he shall appear in court and file special bail.

Emblements. The profits of lands which have been sowed.

Estate per autre vie. The interest which one has in lands during the life of another.

Exoneretur. A discharge of special bail, entered after the surrender of the principal.

Ex post facto. After the act.

Ex parte. On the part of one only.

Ex officio. By virtue of the office.

Feme covert. A married woman.

Feme sole. An unmarried woman.

Fieri facias. A writ of execution commanding that the judgment be made of the estate of the defendant.

Garnishee. The party in whose hands another's money, etc. is attached.

Guardian ad litem. Guardian during suit.

Habeas corpus. A writ commanding that a person in custody be brought before a court or judge for the purpose of investigating the legality of the imprisonment, etc.

Habere facias possessionem. A writ commanding that the sheriff give possession of lands to him who has recovered in ejectment.

Idem. The same.

Ibid. Contraction of *ibidem.* The same place.

Instanter. Immediately.

Jury de mediatate lingua. A jury composed of one half foreigners.

Levari facias. A writ of execution by which land is ordered to be levied.

Livery of seizin. A delivery of possession of lands.

Mandamus. A writ issuing from a superior court to some officer, corporation, or tribunal, commanding some official act to be done.

Malfeasance. A corrupt performance of some official duty.

Mesne process. Intermediate process; the writ by which the defendant is brought into court.

Minimum price. Smallest price.

Misfeasance. An improper performance of some official duty.

Moiety. One half.

Ne exeat. A writ to restrain an individual from departing the state.

Nihil. A return upon a scire facias where it is not executed.

Nihil dicit. } The name of a judgment where
Nil dicit. } no defense is pleaded.

Nihil debit. } The plea of general issue to an
Nil debit. } action of debt.

Non compos mentis. Not of sane mind.

Non sum informatus. An answer by an attorney when he has nothing more to say for his client.

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Non est inventus. A return to a writ of capias where the defendant is not found.
Non est factum. A plea denying the execution of a deed or specialty sued on.
Non assumpsit. The plea of general issue in an action of assumpsit.
Nonfeasance. Non performance of an official act.
Noncupative will. A will made before witnesses, declared by word of mouth only.
Nolle prosequi. Is entered by the prosecuting attorney, when he dismisses or will not further prosecute an indictment.
Oyer. To hear. To crave oyer is to demand the reading of the bond or other writing sued on.
Parol Evidence. Evidence by word of mouth.
Prima facie, On the first appearance. Prima facie evidence is that which is sufficient until obviated by evidence from the opposite party.
Posse comitatus. Power of the county.
Plene administravit. A plea by an administrator that he has fully administered.
Pluries. Oftentimes; a third writ issued where a first and second have not been executed.
Pro confesso. For confessed.
Profert. A party makes *profert* when he brings into court the written instrument upon which he relies in his pleadings.
Qui tam. The name of an action in which the plaintiff sues as well for himself as for the state or public, and in which he is entitled to a part of the judgment recovered.
Quo warranto. A writ requiring the person or body corporate to whom it is directed to show cause why he or they claim to perform a particular function.
Quare clausum fregit. The name of an action of trespass to real property, or for breaking and entering the plaintiff's close.
Quietus. Acquittance.
Res gesta. The subject-matter; things done.
Semble. It seems.
Secus. Otherwise.
Subpœna. The name of a writ generally applicable to summoning witnesses.
Supersedeas. A writ to stay proceedings until the appellate or supreme court shall reverse or affirm the judgment of the inferior court.
Scire facias. The name of a writ requiring the defendant to show cause why execution should not issue upon a judgment or recognizance.
Scire feci. The return to a writ of scire facias when it is served.
Talesmen. Such men as are not regular jurors, taken from the by-standers to complete the regular panel.
Tenancy by curtesy. Is he who marries a woman possessed of lands in fee simple, and has by her a child which comes alive into the world. By virtue whereof he has a life estate in the lands.
Tenant in dower. Is a woman possessing lands which were the property of her deceased husband, and to which she is entitled during her life.
Terre tenant. Tenant of the lands.
Testatem fi. fa. or ca. sa. Is a writ issued to another county, in which writ it is testified or suggested that the defendant is not found or has no property in the first county.
Tort. Wrong.
Venire facias. A writ commanding the proper officer to summon a jury.
Venue. Vicinage; neighborhood. The county or township in which the action is laid.
Venditioni exponas. A writ commanding the officer to offer for sale property previously levied by virtue of a former execution.
Vi et armis. With force and arms. This phrase is applicable to actions of trespass.
Viva voce. With the living voice. By word of mouth.
Voire dire. To speak truly. When a witness is examined under oath as to some collateral matter before he is sworn in *chief*, he is said to be interrogated on his *voire dire.*

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DECISIONS

OF THE

SUPREME COURT OF INDIANA,

AND OTHER COURTS, NOT REFERRED TO IN THE FOREGOING PAGES.

By a provision in the new code of practice, the long established common law rules of special pleading, as modified by statute in this State, have been swept away. Distinct forms of action are abolished. In this sudden transition from one system to another radically different, it may be expected that the classification which the old system gave rise to, should be abandoned. But as that classification furnishes facilities to the practitioner, as well as the student, in his search for precedents, by its subdivisions of the different subjects of law, not readily otherwise supplied, it is deemed prudent, in the following compilation of decisions of courts, to adhere to a portion of its nomenclature.

ABDUCTION.

(*See post, title "Seduction."*)

This offense is punished as a misdemeanor. See ante, R. S., vol. 2, p. 401.

ACCESSORY.

On page 369, R. S. vol. 2, and on page 422, same vol., the punishment of accessories and practice in reference thereto, are provided; by which it will be perceived that an *accessory before the fact*, that is, one who counsels, commands, or procures another to commit a crime, is punished as principal. *An accessory after the fact*, or one who knowing a felony to have been committed by another, receives, relieves, comforts or assists the felon, is punished as a distinct offender.

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ACCORD AND SATISFACTION.

(See ante, R. S., vol. 2, p. 123, sec. 377.)

I.—*What Sufficient.*

To constitute a good accord and satisfaction, it is essential that—1, it be *legal*; 2, *advantageous* to the contracting party; 3, certain; 4, the defendant must be *privy* to the contract; and 5, the accord must be *executed*.

If a party release by parol, a valid claim, which he has against another party, in consideration of the surrender of a claim which such other party makes against him, but which he is under no legal or moral obligation to pay, and no claim is afterwards made by either party for some years, nor until after controversy has arisen between them in respect to other matters, this will be held a valid accord; and the party cannot recover for the debt so released.—22 Vermont Rep. 437.

The doctrine, that the receiving a part of a debt due, under an agreement that the same shall be in full satisfaction, is no bar to an action to recover the balance, does not apply to any cases, except where the plaintiff's claim is for a fixed and liquidated amount, or where the sum due could be ascertained by mere arithmetical calculation.—21 Vermont Rep. 222.

But when a party makes an offer of a certain sum to settle a claim, when the sum in controversy is open and unliquidated, and attaches to his offer the condition, that the same, if taken at all, must be received *in full*, or *in satisfaction*, of the claim in dispute, and the other party receives the money, he takes it subject to the condition attached to it, and it will operate as an accord and satisfaction, even though the party, at the time of receiving the money, declare, that he will not receive it in that manner, but only in part satisfaction of his debt, so far as it will extend.—*Ibid.*

If a debtor tender to his creditor a sum of money, in full of all legal claims, which the creditor may have against him on account, and the creditor receive the money, protesting that it is not sufficient, but saying that he will take it and pass it to the debtor's credit upon the account, and the debtor do not express any dissent to this course, the acceptance of the tender will be held no bar to the creditor's right to recover such sum as may be found due to him, exceeding the amount of the tender.—*Ibid.*

To a suit for unliquidated damages, the defendant may plead that he had delivered to the plaintiff, and that the plaintiff had received from him, goods of a less value than the sum claimed, in satisfaction of the demand.—*Bateman* vs. *Daniels et al.*, 5 Blackf. 71.

In the case—not of a liquidated debt—but of an unliquidated demand of damages, the acceptance of a smaller sum than the plaintiff may have originally claimed, is a satisfaction of his whole demand.

This appears by the following case: The declaration (in assumpsit) stated that T. R., as the defendant's attorney, and in the defendant's name, had sued the plaintiff in the Palace Court for 13*l.* 10*s.*, which action was depending; and thereupon, in consideration that the plaintiff would pay the defendant the 13*l.* 10*s.*, the defendant promised the plaintiff to settle with the said attorney for the costs of the action, and indemnify the plaintiff against them; that plaintiff accordingly paid the 13*l.* 10*s.*; but that defendant neglected to settle with the attorney, who proceeded with the action, and signed judgment against the plaintiff, who was obliged to pay 7*l.* 10*s.* costs, and 3*l.* in endeavoring to set aside the judgment. At the trial, on the general issue, it appeared that Byers, the present defendant, was a wood-turner, who had done work for Wilkinson, the present plaintiff, to

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recover a compensation for which the action had been brought. A verdict was found for the plaintiff, subject to the opinion of the Court, upon the question, whether, as the payment of the 13*l.* 10*s.* was a payment in discharge of an admitted debt, it could be any consideration for the defendant's promise to indemnify the plaintiff against the costs of the Palace Court action. The Court held that the verdict was right.

"The case," said Parke, J., "may be decided shortly on this ground. If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs, and proceed no further. Payment of a less sum than the demand, has been held to be no satisfaction in the case of a liquidated debt, but where the debt is unliquidated, it is sufficient. Now, here we cannot say that there was originally any certain demand. A jury, if asked, could not, in my opinion, have said so. In the great majority of actions of this nature, for work, labour, and goods sold, it is not a specific sum that forms the subject-matter of the action; and, unless that could have been shown in the present case, there was a good consideration for the promise."—*Wilkinson* vs. *Byers*, 1 Adol. & Ell. 106. Vide, 1 Smith's Lead. Cas. 146.

If a chattel of any kind be, by the agreement of the parties, given and accepted in satisfaction of a debt, it is a good discharge. It is not required that the chattel should be of equal value, for the party receiving it is always taken to be the best judge of that in matters of uncertain value.—*Andrew* vs. *Doughey*, 1 Dyer, 75. *Per Denman*, C. J. in *Thompson* vs. *Percival*, 5 B. & Adol. 925.

Debt on a promissory note by the assignees of the payee against the maker. Plea, that the note was given to the payee in consideration of a bond executed by him to the defendant, conditioned for a conveyance in fee-simple of a certain tract of land; that the bond, before notice of the assignment of the note, was transferred and delivered by the defendant to the payee of the note in full satisfaction thereof, pursuant to an agreement of the defendant and the payee of the note, on, &c., at, &c.; and that the bond was then and there received by the payee of the note in full satisfaction of the same. Held, on general demurrer, that the plea was good.—*Bartholomew* vs. *Hendrix et al.*, 5 Blackf. 572.

Suit on a promissory note by the assignee of the payee against the makers. Plea to part, &c., showing that, before the assignment, the payee was indebted to each of the defendants in certain sums of money, and that the payee and another person were indebted in a certain other sum to the defendants, which debts amounted to, &c.,—and stating that such indebtedness was made so many payments on the note described in the declaration, and was received and accepted by the payee as a payment on the note before its assignment,—though informal, is good, on general demurrer, as a plea of accord and satisfaction to part, &c.—*Woods et al.* vs. *Harris*, 5 Blackf. 585.

A new covenant executed for the same sum, with additional surety, (other obligors,) is a good satisfaction of a former covenant.—7 Monroe, 576.

If a debtor accept part of a debt before it is due, or at a different place, in satisfaction of the whole, it will bar the recovery of the residue. So where money is due, and the creditor agrees to accept something else, though of less value, in satisfaction of the debt.—1 Lit. Rep. 51.

After breach of covenant, a parol agreement, if executed, may be relied on as accord and satisfaction; but it must be completely executed.—2 Marsh. 314. There must be an acceptance.—5 Monroe, 13.

A plea alleging the payment and acceptance of a less sum, before the day, or at a different place, or from a third person, in satisfaction, is good.—3 N. H. Rep. 518.

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The plaintiff sold the defendant a wagon, which the defendant sold C. The parties being together, C. promised to pay the plaintiff the price of the wagon, and the plaintiff agreed to accept him as his debtor for the price. Held, that this was an accord executed.—7 N. H. Rep. 397.

Where a party recovered a judgment against another who was insolvent, and the plaintiff afterwards agreed to receive from him the sum of $550 on the judgment, and the payment of $100 attorney's fees, which sums were paid accordingly, and a receipt in full given for the judgment, although both sums amounted to much less than the judgment. Held, that a satisfaction of such judgment would from this state of the facts be ordered to be entered. — *Harper* vs. *Graham*, 20 Ohio Rep. 105.

In this case the supreme court of Ohio, in its opinion, sums up the exceptions to the general rule that payment of a less sum in satisfaction of a debt, is not sufficient evidence of accord and satisfaction, as follows: "We see, then, that the payment of a less sum than is due, the day before a debt falls due, will discharge it—payment at another place than is stipulated will do so—the delivery of a collateral article of any value will do so—the acceptance of the debtor's note with surety, the note of a third person, or even the negotiable note of the debtor himself, will do so; and yet the payment of as much money in hand as is called for by such note, will have no such effect!" The court, in concluding its opinion, decided the case in point to be "taken out of the rule," because payment was made at a different place from the one stipulated.

In Ohio, it has been held, that when in an action of trespass against five, the plaintiff accepts a note from two, payable at a future day, in satisfaction of a trespass, as to the two, but not to operate as a satisfaction as to the other defendants, the cause of action is satisfied, and discharged as to all.—2 O. Rep. 89.

In New Hampshire, it was held that a satisfaction of the claim of one of several plaintiffs, in an action *ex delicto*, cannot be pleaded in bar, nor used as a defense upon the general issue, although, perhaps, it might go to reduce the damages.—5 N. H. Rep. 136.

II.—*What Insufficient.*

Payment of a less sum, after a debt becomes due, cannot be pleaded in satisfaction of a whole debt.—*Bateman* vs. *Daniels et al.*, 5 Blackf. 71; 1 Strange 424; 5 East. 390; 5 Johns. R. 390; 3 N. H. Rep. 518.

A security of equal degree for a smaller sum, if it present no easier or better remedy, cannot be pleaded in satisfaction for the larger one; thus the giving of a promissory note for £5 cannot be pleaded as a satisfaction of a debt of £15. 1 Strange 426.

A tender of a sum agreed to be received in satisfaction of damages, is without legal effect, and cannot supply an actual satisfaction. 5 N. H. Rep. 136.

An accord cannot in any case be pleaded in bar unless it is executed.—*Woodruff* vs. *Dobbins et al.*, 7 Blackf. 582.

Plea of accord and satisfaction is not good, when the satisfaction proceeds from a stranger. 6 Johns. Rep. 37.

It has been held, that to an action of a debt on a bond, the receipt of another bond cannot be pleaded in bar, unless the security or circumstances are made better, as by shortening the time of payment. And again, it is said that making the security better alone, will not be sufficient. But were it admitted that anything may be a satisfaction, which, in itself is the foundation of an action, as in more recent times seems to have been thought by some, still bonds which

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are not assigned, and accounts which could not be assigned, will not be sufficient.—4 Lit. Rep. 243.

Evidence to sustain a plea of accord and satisfaction by the delivery of promissory notes on others, must show an acceptance in satisfaction; and evidence showing there was not an agreement that the notes might be returned if not collected, is not sufficient.—5 Monroe, 205.

An accord without satisfaction will neither bar the original cause of action, nor be sufficient ground for a new action.—3 Marsh. 38.

Delivery of a bond to a ward of full age, by a guardian, for the failure to collect which an action had accrued, can be no satisfaction for the failure.—5 Monroe, 205.

Plea that the plaintiff accepted the provisions in a deed of trust, made to secure the payment of the note in contest, is not good.—6 Monroe, 39.

The payment of the call and interest on a note due in bank, and the execution of a new note by the same persons who were payers in the original note, cannot be pleaded by them as an accord and satisfaction, in an action brought by the bank on the original note. There must be some advantage to the obligee shown in all pleas of accord and satisfaction. When new notes are given and old notes left with the obligee, he may sue upon them; if payments have been made, the defendant may avail himself of them.—3 J. J. Marsh. 196.

An accord and satisfaction, to constitute a bar to an action, must be full, perfect, and complete.—5 N. H. Rep. 136.

ACTION.

(For Criminal Actions, see R. S., vol. 2, p. 361.)

I.—*Form of.*

At common law all civil actions were divided into *real*, *personal*, and *mixed*. Real actions were those brought for the specific recovery of lands, tenements, or hereditaments. Personal actions were those brought for the specific recovery of goods and chattels. Mixed actions partook, to some extent, of the nature of both the other classes. Again, actions were divided into those *ex contractu*, or arising out of contract, and those *ex delicto*, or torts. Under these general divisions have grown up many subdivisions, under which the great bulk of the common law is arranged in the various treatises and digests. The new code, 'tis true, abolishes distinct *forms* of action; but on p. 43, R. S., vol. 2, the misjoinder of certain *causes* of action is made the subject of demurrer. And the court, in furtherance of justice, may require separate trials to be had for different causes of action, even where they are not improperly joined. In the Justice's Act, R. S., vol. 2, p. 455, the joinder of actions *ex contractu* and *ex delicto*, is expressly prohibited. From which it is inferred that, for some purposes, distinctions in the forms of actions will still prevail.

Under this head (Action) are collected decisions most of which are usually found under the title "Action on the case," or "Case." The other decisions in this compilation are arranged under appropriate heads, forming subdivisions of the general subject "Action."

II.—*Parties.*—(*See R. S., vol. 2, p. 27.*)

III.—*Where commenced.*—(*See R. S., vol. 2, p. 33.*)

IV.—*Pleadings.*—(*See R. S., vol. 2, p. 37.*)

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V.—*General Principles.*

An action lies in favor of a landlord against any person who so wrongfully and maliciously disturbs his tenants that they abandon his premises, and the landlord thereby loses his rent.—1 Hall's N. Y. Rep., 210.

In the sale of provisions for domestic use, the vendor is bound to know that they are sound and wholesome at his peril, and if they are not so, he is liable to an action.—10 Mass. Rep., 197.

Jones, a merchant tailor, was engaged in carrying on a profitable trade, in his line of business, from New York to New Orleans, the successful prosecution of which depended on a knowledge of certain things, known to so few that his gains were very large. Baker, one of the defendants, conspired with Jones's foreman in Jones's absence to obtain the secrets of the business, did obtain them, and was in consequence, enabled to rival Jones in his trade. Held, that an action in favor of Jones vs. Baker and the foreman might be maintained.—7 Cowen's Rep. 445.

An action also lies against a person, who obstructs the execution of process for whatever damage the party thereby injured may sustain.—2 Wend. 559.

A printer of a newspaper is liable for carelessly printing an advertisement.—(9 Mass., 484.) So is an agent for taking insufficient security for his principal.—12 Johns. 300.

A postmaster who assumes to charge letter postage on a newspaper, in consequence of an initial being on the wrapper, does not act judicially in such a sense as to protect him from an action for improperly detaining such newspaper, although no fraud or malice be alleged or proved.—1 Comstock's N. Y. Rep., 537.

An action will lie for any injury consequential upon any act of the defendant, whether the act be lawful or unlawful, and notwithstanding the injury be accidental and contrary to his intention, if the act be unnecessary, or be attended with circumstances of carelessness and inattention. (11 Mass. 137.) As when the defendant frightened the plaintiff's horse by discharging a gun, whereby the plaintiff was injured in his property. (Ibid.) Or for discharging a loaded musket at a vessel and wounding the master, by which means the intended voyage was defeated, and the owners sustained loss.—1 Mass. 145.

If any loss or damage happen to a person in consequence of a breach of duty in another, which the law imposes, the latter will be answerable for the same, if the former have acted with ordinary prudence and discretion, although the injury be not the immediate consequence of such breach of duty. (7 Mass. 169.) Thus, where the plaintiff's raft ran aground in the defendants' canal, which they were bound to render navigable, and to keep in repair, and while the plaintiff was waiting in that situation for more water to enable him to pass, a storm came, by which a quantity of wood forming a part of the raft, was lost; it was held that the defendants were liable.—*Ibid.*

If an attorney negligently lose the debt of his employer, he is liable; but he is not liable for the loss of the evidence of the debt, if the party has another sufficient remedy.—3 Bay, 390.

It is no justification to an action for negligently driving that the plaintiff was on the wrong side of the road, if there was room sufficient for the defendant to pass without inconvenience.—5 Esp. 44.

If a horse and cart are left standing in the street without any person to watch them, the owner is liable for any damage done by them though it be occasioned by the act of a passer-by in striking the horse.—5 C. and P. 190.

Where one party sustains an injury by the culpable misconduct, or negli-

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gence of another, the party injured may recover compensation for it by an action.—21 Vermont Rep. 102.

If a dog be accustomed to bite, his owner or keeper, who is aware of his vicious habit, and suffers him to go at large, is liable for an injury committed by him.

An action will lie immediately for the civil injury, although the act done may amount to a felony.—Pr. Dec. 203.

An action will lie against a deputy postmaster by the party aggrieved for negligence in office.—2 Bibb. 211.

If a person use the name of another officiously and without authority, whereby damage befalls him, he shall have an action to be redressed for the injury.—Hardin, 513.

Where an employer placed one person in his employ under the direction of another, also in his employ, such employer is liable in an action, for injury to the person of him placed in the subordinate situation, by the negligence of his superior.—20 Ohio Rep. 415.

Where a large number of pieces of German silver of the precise form and thickness of Mexican dollars, and made into that form for the purpose of being stamped and milled into counterfeit coin of that description, were taken by the sheriff from a person who was carrying them at the time to a place of manufacture for the purpose of having them finished, so that he could put them in circulation as genuine coin, and were detained, under the direction of the prosecuting officer to be used as evidence against the person from whom they were taken, and also for the purpose of preventing their circulation, it was held, that the owner of them, in the absence of evidence that they were put in that form without his knowledge, or against his consent, could not sustain an action against the sheriff therefor.—21 Vermont Rep. 9.

An action cannot be sustained against one who is a mere depositary of money, unless his situation have been changed from that of a depositary of money to that of a debtor, either by a wrongful refusal to pay the money upon proper request, or by a wrongful appropriation of it.—21 Vermont Rep. 558.

The president and professors of a literary institution were to have all the tuition money received, and agreed that it should be divided between them according to certain specified rates and proportions; and it was also agreed that all the money collected should be delivered to a depositary, or treasurer, and that the interest of the money of the members in the fund when so in deposit, should be distinct and several interests, and not to any extent or purpose joint interests; and the depositary had no right to make any investment of the fund, either for the benefit of the members, or for his sole benefit; nor were there any charges upon the fund in his hands in the adjustment of which there might be a common interest. Held, that the effect of the agreement was, when the money was deposited, to sever the previous joint interest of the parties, and to vest in each member the right to demand his several share from the depositary.—*Ibid.*

A promise to indemnify for an act known at the time to be a trespass, is illegal and void.—17 Johns. 142.

An action cannot be maintained to recover a sum omitted by mistake in a former trial.—11 Johns. 530.

A plaintiff suing for negligence must himself be without fault.—6 Hill's Rep. 692.

Where several defendants were engaged at the same work, and one of them was injured by an act of negligence in which all participated, the master being absent at the time: Held, in a suit brought against the master for the injury,

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that the servant could not recover, though the act complained of was done under the superintendence of a foreman appointed by the master, and the servant was under age.—*Ibid.*

Semble, that even had the servant been free from all negligence, he could not have recovered against the master.—*Ibid.*

An action will not lie against a person who by perjury fraudulently obtained a judgment in another State.—3 Johns. 157.

When the legislature authorizes an act, the necessary and natural consequence of which is, damage to the property of another, he who does the act is not liable in an action at common law, as a wrong doer: but the party injured must pursue the remedy provided by the legislature.—12 Mass. 466.

An act done in pursuance of an unlawful intent, and without occasioning any actual damage, is no ground for a civil action.—2 Mass. 112.

An action will not lie to recover back money or chattels advanced upon a contract *wrong in itself*.—1 Tyl. 457.

No action lies for representing the plaintiff's ferry not to be as good as another rival ferry, and thereby preventing travellers from crossing at the plaintiff's ferry.—15 Johns. 185.

VI.—*Injuries to Real Property.*

[See Trespass.]

It is oftentimes a difficult question to determine for what acts performed by one person on his own land injurious to the land of his neighbor, an action will lie. The authorities are conflicting. In 4 Coms. N. Y. Rep., p. 200, justice Bronson sums up most of the authorities in point. We extract the following from his opinion: "Let us now see what a man may do in the enjoyment of his own property, without being answerable to others for consequential damages—always assuming that he acts with proper care and skill. He may set fire to his fallow-ground; and though the fire run into and burn the woodland of his neighbor, no action will lie. He may open and work a coal mine in his own land, though it injure a house which another has built at the extremity of his land. And he may do the same thing though it cut off an underground stream of water which supplied his neighbor's well, and leave the well dry. He may build on his own land though it stop the lights of his neighbor; and even though he build for the very purpose of stopping the lights, [except such lights be ancient, or of 20 years continuance.] He may pull down his own house, though the adjoining house fall for the want of the support which it before had; and he may do it without shoring up the adjoining house, that being the business of the owner. He may pull down his own wall, though the vaults of his neighbor be thereby destroyed. He may build a house and make cellars upon his soil, whereby a house in the adjoining soil falls down. He may dig in his own land, though the house which his neighbor has previously erected at the extremity of his land be thereby undermined and fall into the pit. The defendant, for the purpose of laying the foundation of a house in his own land, dug some distance below the foundation of the plaintiff's house in the contiguous lot, whereby the walls of the plaintiff's house were cracked, and the house was otherwise injured; and it was held that no action would lie. The plaintiffs were the owners of a church, built within six feet of the line of their lot, and the defendant for the purpose of building on his adjoining lot, was sinking the foundation for his building sixteen feet below the natural surface of the ground, and ten feet below the foundation of the church, whereby the foundation of the church was greatly endangered; and yet, an injunction to restrain the excavation, which had been granted by a master, was dissolved by the chancellor, on

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the ground that the defendant was exercising a lawful right. The plaintiff had built a valuable house on Beacon Hill in the city of Boston, one side of the house being within two feet of the side of his land, and had taken the precaution to sink his foundation fifteen feet below the ancient surface of the ground. Seven years afterwards the defendant commenced digging and carrying away the earth from his adjoining land, and dug to the depth of from thirty to forty-five feet below the natural surface of the ground, by reason of which the foundation of the plaintiff's house was rendered insecure, and he was obliged to take the house down. And yet it was held that no action lay for the injury to the house." From which premises justice Bronson concludes that a "man may also, without being liable to an action, dig so near the premises of another, that the soil, without any superincumbent weight is precipitated into the pit.

But in Stephen's Nisi Prius, vol. 2, p. 1012, it is said that "a man excavating his own land adjoining the house of another, is bound to take the necessary precautions that injury does not result from his acts because he is cognizant of what is taking place; the neighboring owner is not, or if he is, he does not know what precaution may be necessary; and he cannot enter upon the land to examine the nature of the excavation. So, in Jones vs. Bird, 5 B. & A. 837, it was held that a party doing a work is bound to take care that it be not injurious to the adjoining premises, and to use every precaution for that purpose which a skilful man could reasonably be required to use in such a case. So, it was held by Lord Ellenborough in Selwn. N. P., 441, "that where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or, as it were of leaning to his neighbor's soil, so that his neighbor could not dig so near, as to remove the support; but that it was otherwise of a house, &c., newly built." "If a man build a house, and make cellars upon his own soil, whereby a house *newly* built upon the adjoining soil falls down, no action lies."—2 Roll. Abr., 565. In 12 Mass., 220, it is decided where one built a house upon his own land within two feet of the boundary line, and seven years afterwards the owner of the adjoining land dug so deep into his own land as to endanger the house, upon which account the owner of the house left it and took it down, that no action lay for the damage done the *house*, but that the owner was entitled to damages for the falling of his *natural soil* into the pit. So in 17 Johns., 92, it was held that evidence of negligence will support an action where the defendant dug up the soil of a lot contiguous to the plaintiff's house, whereby the foundation-wall of the plaintiff's house was injured. And in 12 Mass. 220, it was held that a man in digging upon his own land, even where he is not restrained by covenant or custom, or the pre-existing rights of his neighbor, is to have regard for the position of his neighbor's land, and the probable consequences to his neighbor, if he dig too near his line.

In brief, the current of English authorities is that, in the absence of negligence and want of skill, the owner of the land dug in is not liable for any injury to the *house*, &c., of another on contiguous land. But if any of the *soil* of that contiguous land is precipitated into the pit by such digging, an action for the damage thus occasioned accrues to the owner of that soil against the owner of the land digged in, whether there was negligence, want of skill or not. With the exception of the opinion of Justice Bronson above referred to, the American authorities, it is believed, adhere to the same rule. It is, however, well established that reasonable care must be used to prevent injury in all such cases. The absence of caution and reasonable skill will in every instance render the offending party liable to the one injured.—See Stephen's N. P., p. 1012; 12 Mass. 220; 17 Johns. 92.

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This was a special action on the case against the defendants for erecting a a dam and overflowing the plaintiff's land. Held, that the plaintiff need not show title in himself. Possession was sufficient.—2 Maryland Rep. 473.

An action lies where the defendant sold to the plaintiff land which had no real existence. 13 Johns. 325. So, where the defendant's servants placed rubbish so near plaintiff's wall that some of it must naturally and did fall against it doing it damage.—Chitty Pl., vol. 1, 160. So, where damage was sustained in consequence of the want of ordinary skill in laying the foundations of a house.—3 Wend. N. Y. Rep. 154.

Where a person or his servants in burning his fallow-ground, negligently injures his neighbor, an action lies.—5 Johns. 329.

So, where the defendant diverted a water course from the plaintiff's land.—1 McCord's S. C. Rep. 543.

And where a person is induced to purchase land by a false representation that a certain privilege is annexed to the land, but which is not included in the deed, he may maintain an action against the vendor.—13 Johns. 395.

Where two distinct parts of a building, bridge, mill-dam, &c., one of which parts cannot be severed nor permitted to decay without impairing the use of the others, for any negligent or wilful act concerning one portion to the injury of the other, an action is maintainable.—11 N. Hamp. Rep. 536.

So, an action will lie by heirs, to recover damages for destroying their title deeds.—7 Mass. 135.

The owner of land on the shore of a stream or lake, or adjoining the track of a railroad may lawfully build thereon, though the situation be one of exposure and hazard; and he is nevertheless entitled to protection against the negligent acts of persons lawfully passing with vessels or carriages propelled by steam engines, by which such buildings are set on fire.—1 Denio's N. Y. Rep. 91.

In such an action it is competent for the plaintiff to show that experienced persons in such employments were accustomed to use precautions which the defendants neglected.—*Ibid.*

An action lies against the board of commissioners of Vigo county for damages to certain land, occasioned by draining Lost creek, &c.—*Genung* vs. *The Board, &c.*, 5 Blackf. 440.

If one person injure the buildings of another by negligence, an action will lie. Thus it was held, that an action lay against a party for so negligently constructing a hay rick on the extremity of his land, that, in consequence of its spontaneous ignition, his neighbor's house was burnt down.—3 Bing. N. C. 458.

If the occupier of a house who has a right to have the rain fall from the eaves of it upon the land of another person, fixes a spout whereby the rain is discharged in a body upon the land, the owner of the land can maintain an action against the occupier of the house.—Str. 634.

No action will lie against the vendor of real estate for false and fraudulent representations, as to the quality and situation of land, both of which are open to review and might be seen.—2 Day's Conn. Rep. 128.

It is a common principle of the civil and common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface to any extent he may choose to occupy it; provided he so use his room as not to injure the property or impair any actual existing rights of another.—12 Mass. 220. Hence if a man do what he has a right to do upon his own land, without trespassing upon any law, custom, title or possession, he is not liable to damages for injurious consequences; but the damages shall be considered as casualties for which he is not answerable; unless they be the consequences of an act done, not for his

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own advantage, but maliciously.—*Ibid.* Thus if a man purchase land adjoining his neighbors, and build a house upon it, he can maintain no action against his neighbor for obstructing the light and air, by erecting a building upon the adjoining land, or for any other injury occasioned by the use and improvement of the adjoining land; for a man who builds a house adjoining his neighbor's land, ought to foresee the probable use by his neighbor of the adjoining land, and by convention with his neighbor, or by a different arrangement of his house, secure himself against future interruption and inconvenience.—*Ibid.* But no man having land adjoining his neighbor's which has been built upon for twenty years or more, shall erect a building in such manner as to interrupt the light or air of his neighbor's house, or expose it to injuries from the weather, or to unwholesome smells; or to do any act on his own land, which shall cause an injury to his neighbor's house.—*Ibid.* If, however, the owner of land with a house upon it sell the house to another without any exception or reservation of a right to build on the adjoining ground, or to stop the lights in the house which he sold, he cannot afterwards lawfully stop those lights, and thus defeat and impair his own grant; nor can he convey a right so to do to a stranger; and if either the grantor or his assigns, shall build upon the adjoining ground, to the interruption of the light and air of the house sold, he will be liable to the grantee.—12 Mass. 157.

VII.—*Injuries to Personal Property.*

[See Trespass.]

And an action may be maintained against a ferryman for an injury to plaintiff's horse, in consequence of the chain which fastened the boat to the shore breaking.—S. Ca. Rep. 17.

So where the defendant's horse injured the plaintiff's.—3 Halst. N. J. Rep. 267.

The defendant hired a horse from the plaintiff to ride a certain number of miles, and drove so carelessly, and immoderately, that the horse died, and the sleigh was broken. Held, that an action might be maintained against the defendant.—5 Mass. Rep. 104.

And where the owner of a vessel navigating a river having it in his power to avoid a collision with another vessel, and refusing or neglecting to exercise the power he possesses, whereby he injures the plaintiff's vessel, an action lies.—Ohio Cond. 305.

Where the defendant falsely affirmed that a chattel belonged to him, whereby the plaintiff was induced to buy it, and was afterwards dispossessed of it, an action may be maintained.—13 Johns. 225.

An action lies for harboring plaintiff's servant.—13 Johns. 322.

If in an action for the negligence of the defendant's servants in managing a barge so that the plaintiff's barge was run down, it appeared that the accident happened from circumstances which persons of competent skill could not guard against, the plaintiff will not be entitled to recover; nor will he if his men had put his barge in such a place that persons using ordinary care would run against it; nor if the accident could have been avoided but for the negligence of the plaintiff's own men, in not being aboard his barge at the time when it was lying in a dangerous place.—4 C. and P. 106.

In an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, the jury, to find for the plaintiff, must be satisfied that the mischief was occasioned by the swell alone; and if they think it doubtful whether it was,

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or think that the plaintiff contributed to the injury he sustained by his own improper conduct, either in mismanaging or overloading the boat, they must find for the defendant.—5 C. and P. 421.

If the defendant justify shooting a dog because the dog was worrying his fowl, and could not otherwise be prevented, he must prove that the dog was in the act of worrying the fowl at the very moment he shot him.—1 Campbell, 41.

A party having received from another a number of hogs to fatten on shares, when they were fattened gave notice to the owner, and required him to attend to the division of the hogs within three or four days, and take away his share; but the owner refusing to attend, the keeper of the hogs made such division himself, and turned the owner's share loose in the streets; it was held, that the keeper was guilty of a violation of duty by such conduct, and that he was liable to the owner in damages.—4 Wend. 525.

An action lies for the owner of a pew in a parish or town meeting-house, if the house is taken down by a vote of the parish or town without providing him a compensation.—1 Pick. 105.

Where a horse had been killed by falling down an old shaft of a mine, which had not been sufficiently covered over, it was held, that the owner of the horse could maintain an action for the value of the horse against the proprietor of the mine.—1 M. and W. 435.

The defendant is not liable for injuries inflicted by his bull upon plaintiff's horse, unless he knew the animal was accustomed to do mischief.—13 Johns. 337.

A captain of a vessel is not liable for injuries sustained by a vessel which his vessel ran foul of, he being on shore at the time and his vessel under the control of a pilot.—1 Johns. 305.

VIII.—*Injuries to the Person.*

[See Trespass.]

Where the defendant carelessly drives his horse and gig, as to run against a person in the street, whereby such person is injured, he is liable to an action. —6 Cowen's Rep. 342.

An action lies in favor of the husband against a surgeon for an unskilful operation upon his wife, notwithstanding she dies of the operation.—2 Root's Conn. Rep. 90.

So in 1 Bay's Rep. 6, the defendant, a doctor, was held liable to vindictive damage for putting *cantharides* in a glass of wine which the plaintiff drank.

If a man ride an unruly horse to a place of public resort to tame him, and he break loose and strike the plaintiff, an action lies against the owner of the horse. (2 Lev. 172.) So it lies if a man permit a mad bull to go at large, knowing he was mad, whereby the plaintiff was gored.—1 Vent. 295.

A foot passenger, though he may be aged and infirm from disease, has a right to walk in the carriage way, and is entitled to the exercise of reasonable care on the part of persons driving carriages along it.—5 C. & P. 407.

In an action for not sufficiently securing a fierce dog kept by the defendant, and by which the plaintiff was bitten, the plaintiff may recover, notwithstanding he had on a previous day been warned against going near the dog, if the jury think that the accident was not occasioned by the plaintiff's own carelessness and want of caution.—5 C. & P. 489.

In such an action proof that the defendant had warned a person to beware of the dog, lest he should be bitten, is evidence to the jury of the allegation that

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the dog was accustomed to bite mankind. (1 Starkie, 285.) So it is not essential that the defendant should own the dog; it is sufficient if he harbor or allow it to resort to his premises. (5 C. & P. 1.) Where the defendants justified shooting the plaintiff's dog by pleading that he attacked them, and that he was accustomed to attack and bite mankind, the plaintiff may call a witness to prove the general quietness of the dog.—1 C. & P. 104.

It is universally the duty of the occupier of a house, having an area fronting the public street, so to fence it as to make it safe to passengers, and it is no defense to an action against him for neglecting to do so, whereby the plaintiff fell down into the area and was hurt, that when he took possession of the house, and as long back as could be remembered the area was in the same open state as when the accident happened.—3 Campb. 398.

Where A., B. and C. run a line of stage coaches between two different places, and the route was divided between them into sections, the occupant of each section furnishing his own carriages and horses, hiring drivers, and paying the expense of his own section; and the money received as the fare of passengers, deducting therefrom only the tolls paid at turnpike gates, was divided among the parties in proportion to the number of miles of the route run by each; and an injury happened to a third person through the negligence of the driver of the coach of A., it was held, that a joint action, at the suit of the injured party, lay against B. and C. as well as A.—11 Wend. 571.

An action lies where the defendant being intoxicated had fallen asleep in his sleigh and the horse ran off and ran against the plaintiff's horse, whereby his leg was broken.—1 Coxe, 339.

Where a gamekeeper returning home from his duty left his gun loaded in a play-ground, and one of the boys fired it off and injured another, it could not be doubted but that the gamekeeper must answer in damages to the injured party.—2 Steph. N. P. 1017.

ADULTERY.

[For Criminal Action, see R. S., vol. 2, p. 433; in application for Divorce, R. S. vol. 2, p. 234 and 235; in Civil Actions, post, title "Criminal Conversation."]

ADVANCEMENT.

[See R. S., vol. 1, p. 250, secs. 12, 13 and 14; also, R. S., vol. 2, p. 330, sec. 9.]

Advancement is that which is given by a father to his child or presumptive heir, in anticipation of what he might inherit.—17 Mass. R. 358.

Upon the naked fact that a father buys and pays for land, and has the deed thereof made to an infant child, the inference of the law is that it is an advancement, and not a resulting trust in favor of the father. But it is always competent to meet and repel such inferences by proof that the father did not intend it as an advancement. In such cases the question is one of intention entirely.—5 Barbour's N. Y. Rep. 424.

In proceedings for partition, the R. S. of 1843 (similar to that of 1852) give the defendants the right to bring to the notice of the court, before the awarding of partition, any advancement made by the ancestor to any of the heirs; and such advancements, when their amount has been ascertained, must be taken

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into consideration by the court in specifying the shares to be assigned in the partition.—*Kepler* vs. *Kepler*, 2 Carter's Ind. Rep. 363.

A father conveyed lands to his son in fee, by deed dated Aug. 26, 1826, in consideration of love and affection, and the son by indenture, dated Aug. 28, conveyed to his parents an estate therein for their lives, describing the land as being the same that the said J. W. deeded to the said J. B. W., Aug. 26, 1826."

By indenture dated Aug. 29, 1826, the parents conveyed the premises to the son, to hold during their lives, in consideration of which he covenanted to maintain them. Held, after the decease of the parents, the instruments having been executed at the same time, that the conveyance to the son was to be deemed an advancement to the extent only of the value of the reversion, after the determination of the life estate, and that this value should be ascertained by deducting from the value of the land, at the date of the deed, the sum of its annual value, discounting the interest thereon from the end of each year, during the existence of the life estate.—14 New Hamp. Rep. 287.

Held, also, that the recital in the indenture of the date of the deed did not estop the son from showing that the instruments were all executed at the same time.—*Ibid.*

ADVERSE POSSESSION.

[For definition, see R. S., vol. 2, p. 171—notes.]

J. and H. were tenants in common of two lots, but neither was in actual possession. J. made a deed for the whole property to L., and L. to M. in 1819. M. took possession of the entire property and improved it. In 1836, J. and H. deeded the lots to K., the lessor of the plaintiff. This suit was commenced against the heirs of M. in 1847. M. and his heirs had been in possession and claiming title to the entire property under and from L. more than twenty years before the commencement of the suit. Held, that M.'s possession of the whole property was adverse, and that the deed to K. was void. — *Doe d. McCarty et al.* vs. *McCleary*, 2 Carter's Ind. Rep. 405.

An entry upon real estate adverse to the lawful owner, will not be presumed, but must be proved.—2 Carter's Ind. Rep. 123.

The following instructions were offered and refused:

If it has been proved that the plaintiff or those under whom he claims, at any time within twenty years before the commencement of this suit, acknowledged the right and title of the defendant in the premises in dispute, the statute of limitations does not apply, nor can the plaintiff set up an adverse possession so as to enable him to sustain this action. Held, that the instructions were rightly refused.—2 Carter's Ind. Rep. 230.

The possession of an execution-defendant is not adverse.—2 Carter's Ind. Rep. 17. (See post, title, "Champerty.")

AGREEMENT.

[See post, title "Contract."]

APPRENTICES.

[See R. S., vol. 1, p. 363.]

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ARBITRATION.

In addition to the decisions collected on pages 227–8–9, 230–1–2–3, R. S., vol. 2, the following from our supreme court reports are to be found in 2 Carter:

Award in these words: "We, &c., do award to A. B. 9 dollars and fifty cents for each and every acre of bottom corn on the 17th of June last, and 1 dollar and fifty cents per acre for subsequent tending; also, to A. B., 2 dollars and fifty cents for the hill corn, and 1 dollar and 50 cents per acre for subsequent tending, &c. Making for A. B. bottom corn, including subsequent tending, 11 dollars per acre; and for the hill, including subsequent tending, 4 dollars per acre." Held, that as this award furnishes no definite sum to be paid A. B., nor data from which it can be computed, it was correctly set aside.—*Hays et al.* vs. *Hays*, 2 Carter's Ind. Rep. 28.

Uncertainty in an award renders it void.—*Ibid.*

The plaintiff filed in the clerk's office a bond of submission executed to him by the defendant, and an award in favor of the former against the latter. The defendant moved the court to have the award modified, and the motion was sustained. He proved that the arbitrators, in making the award, did not take a judgment in his favor against the plaintiff into consideration; it not having been brought before them. The court ordered the amount of the judgment to be entered in favor of the defendant on the award, and adjudged that said judgment was satisfied. This allowance caused a balance against the plaintiff on the award, for which judgment was rendered against him. Held, that there was error in causing the judgment to be credited on the award, and that the judgment in favor of the defendant was erroneous.—*Huse* vs. *Inman*, 2 Carter's Ind. Rep. 217.

ASSAULT AND BATTERY.

(For Criminal Action, see R. S., vol. 2, p. 426; Civil Action, post, title, "Trespass.")

ASSIGNMENT.

(See notes to act on p. 379, R. S., vol. 1, and R. S., vol. 2, pages 335–6.

A bill in chancery by A. B. against C. D., and E. F. alleged that A. B. and E. F. recovered judgment against C. D.; that E. F. subsequently assigned his interest to A. B.; that afterwards E. F., in his and the name of A. B., in consideration of his individual debt to C. D., gave the latter a receipt for part of said judgment—C. D. knew of the assignment when he took the receipt. Held, that the receipt was fraudulently obtained, and that execution might issue upon the judgment as though no receipt were obtained.—*Branham et al.* vs. *Rose*, 2 Carter's Ind. Rep. 26.

Bill in chancery against the administrators and heirs, to subject a certain town lot, left by the deceased, to the payment of a judgment assigned to the complainant. The heirs, by their guardian *ad litem*, answered, among other things, that the complainant assigned the judgment to one Petty, by the following writing: "Cambridge City, February 7th, 1846. To the clerk of the Wayne circuit court.

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Sir: You will please pay to William Petty, the amount of my claim which I hold against Jesse Stewart in the Wayne circuit court, which was assigned to me by Isaac Myers. John Teetor." Held, that this was not an assignment of the judgment.—*Teetor* vs. *Abden et al.*, 2 Carter's Ind. Rep. 183.

The assignment of property by the debtor, for the benefit of his creditors, is void, if there is a secret trust for his benefit.—*Caldwell* vs. *Williams*, 1 Carter's Ind. Rep. 405.

Exclusive possession must accompany or follow an assignment of property for the benefit of creditors, or it is fraudulent and void as to the creditors, unless a sound reason is given for the omission of such possession to rebut the presumption of fraud.—*Ibid.*

Where there is a common purpose between the assignor and the assignees, to defraud, the declarations of the assignor made after the deed, are admissible to prove the fraud.—*Ibid.*

The assent of part of the creditors to an assignment of personal property by the debtor, which is fraudulent as between him and the assignees, the creditors having an opportunity to observe the suspicious nature of the transaction, does not purge the contract of fraud even as to them, and the fraud pervades and vitiates the whole assignment.—*Ibid.*

ATTACHMENT.

(See R. S., vol. 2, from page 63 to 73.)

Where an obligor, summoned in an attachment-suit as garnishee, answers that the obligation was assigned before he was summoned, the attachment-plaintiff cannot reply that the garnishee had no notice of the assignment until after he was summoned.—*Smith et al.* vs. *Blatchford*, 2 Carter's Ind. Rep. 186.

Attachment against a canal boat, for articles furnished for the boat at the request of the master. Attachment was served on the boat, and notice given the master. The justice's record shows a bond of the same date as the attachment, executed by the master and H., conditioned for the payment of all demands which might be adjudged in said cause due, which was approved by the justice. The transcript does not show any use made of the bond. No motion was made for the discharge of the boat, nor was the boat discharged. Judgment against the boat. Appeal to the circuit court. The defendant moved to dismiss on the ground that no judgment could be rendered against the boat, which motion was overruled, and judgment rendered against the master for the plaintiff's demand, to be levied of the said canal boat. Held, that the case stood as if no bond had been given. Held, also, that the motion to dismiss was properly overruled. Held, also, that the judgment of the circuit court was substantially good.—*Canal Boat Odd Fellow* vs. *Stewart et al.*, 2 Carter's Ind. Rep. 240.

The plaintiff took out a writ of foreign attachment against the property of the defendant. The latter gave bond, and his property was released, and at the succeeding term there was an order of publication. At the term subsequent, the administrator of the plaintiff's estate appeared and suggested the death, since the last continuance, of the plaintiff, and it was ordered that the suit be revived in the name of the administrator. Publication was proved. At the next term the parties appeared, and the defendant failing and refusing to make any defense, judgment was rendered for the plaintiff, with an award of execution. The transcript contains a statement of the clerk that the defendant moved to dismiss the cause for the want of a *scire facias*, and that the motion was overruled. Held, that the statement of the clerk was no part of the record. Held, also, that

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as the defendant appeared to the suit, and suffered judgment to be rendered against him without objecting to the order of revival, he may be considered as having waived the objection.—*Shoup* vs. *Conwell*, 2 Carter's Ind. Rep. 497.

If, in an attachment against a boat, the boat be released by giving a bond as prescribed by statute, the judgment for the plaintiff should be against the debtor personally.—2 Carter, 535.

Attachment against a boat. The master gave bond, appeared, and defended, and the justice erroneously rendered judgment against the boat, instead of against the master. Appeal to the circuit court. The attorney for the boat moved to dismiss the cause, which motion was overruled. He then offered to go to trial on behalf of the boat, but the court tried the cause as between the plaintiff and the master, and gave judgment against the latter. Held, that the cause should not have been dismissed, and the court correctly rendered judgment against the master. If neither party, on appeal to the circuit court, require a jury, the cause may be tried without a jury, though the amount in controversy exceed 20 dollars.—*Ibid.*

It is no objection to a foreign attachment against A., that the debt on which the writ is founded, is evidenced by the joint and several note of A. and B.—*Higgins* vs. *Pence*, 2 Carter, 566.

In such case, a plea that the latter was a resident of the county, and the owner of lands and goods there sufficient to satisfy said note, is bad, either as a plea in abatement, or in bar.—*Ibid.*

ATTORNEYS AT LAW.

I.—*Admission.*—(*See R. S., vol. 2, p. 201.*)

II.—*Authority.*—(*See R. S., vol. 2, p. 202.*)

III.—*Rights, Powers, Duties, &c.*—(*See R. S., Vol. 2, p. 201 and 202.*)

It is the duty of an attorney before he commences a suit, to use reasonable diligence in making himself acquainted with his client's case; and if documents are relied upon to support the interests of his client he is bound to examine such documents, and not to act upon the representations that may be made to him by his client respecting their contents.—3 C. & P., 341.

An attorney is required to be acquainted with the accustomed practice of the court; he is also bound to know the ordinary rules of pleading and evidence, the existence of statutes and rules of courts, and where they are plainly worded, their construction.—3 B. & C. 738.

It is the duty of an attorney, in a reasonable time, to inform his client of the receipt of money collected for him, and either to transmit it to him, or to hold it subject to his order, and a neglect or refusal to do so, or to render an account, is such fraudulent conduct as deprives him of all right to claim compensation for his services.—4 Watts, 420.

Contracts by attorneys to receive part of the property named, are void.—1 Ohio Rep. 132.

Where an attorney has been employed in a cause and is afterwards discharged by his client, not on the ground of misconduct, the court will not restrain him from acting for the opposite party, unless it clearly appear that he has obtained information in his former character, which it would be prejudicial to the cause of his former client to communicate.—4 Tyr. 78.

Attorneys have a general lien upon the money and papers of their clients in their possession, for their professional services, subject to attaching equities.—See 2 Kent, 641.

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In Bouvier's Law Dictionary, the duties of an attorney, with references to appropriate decisions, is thus summed up: 1, to be true to the court and his client; 2, to manage the business of his client with care, skill and integrity; 3, to keep his client informed as to the state of his business; 4, to keep his secrets confided to him as such.

In an action for fees by an attorney against his client, the latter may show that the attorney conducted the business so negligently that his services were of no benefit to the client, and thus defeat the whole claim.—9 Con. 57.

Proof in such an action that judgment, as in case of non-suit, was obtained against the client, is not, *per se*, evidence of negligence.—*Ibid.*

An attorney is not bound to proceed in a cause, unless his legal fees are tendered or secured to him, if he request that this should be done.—*Ibid.*

An attorney is entitled to have allowed to him a reasonable compensation, with reference to the nature of the business transacted for his client, and his own standing in the profession for learning and skill.—21 Vermont Rep. 419.

For the purpose of determining this, evidence of the prices usually charged and received for similar services of the same profession, in the same vicinity and in the same court, will be allowed.—*Ibid.*

The agreement which lawyers may make with their clients, for fees, are not restricted by law; and where there is no special agreement, the law will allow compensation according to the value of the services.—2 Dana's Ky. Rep. 228.

A lawyer employed to defend a suit, is not authorized to consent to the entry of judgment against his client, without his assent. His doing so is a violation of the confidence reposed in him; and if done with a corrupt intent, involves such a degree of moral turpitude as would authorize the court to strike his name from the roll of attorneys.—1 Scam. Ill. Rep. 123.

When an attorney commences an action in the name of another, or appears for another, the court will presume that he has authority to do so until the contrary appear. 1 Scam. Ill. Rep. 291. This is the law in Indiana, with the limitation contained in R. S., vol. 2, p. 202, sec. 772.

An attorney has no right to purchase real estate under his client's execution, unless specially authorized.—7 Hump. Tenn. Rep. 468.

IV.—*Liabilities.*

An attorney is, in general, liable for the consequences of ignorance or non-observance of the rules of practice; for the want of care in the preparation of a cause for trial, or of attendance thereon with his witnesses, and for the mismanagement of any part of the cause allotted to him.—6 Bing. 467.

An attorney is not liable for the consequence of a mistake in a point of law, upon which a reasonable doubt may be entertained.—1 N. & M. 262.

It is not enough to show merely by the event, that the course adopted by the attorney was wrong from the beginning, and the business charged was consequently useless, because an attorney is not expected to insure to a client a beneficial result; he is not required to have an infallible knowledge of law; the substantial question is, whether in advising and taking the proceedings, he acted *bona fide*, and with a due degree of discretion and judgment; whether, in the exercise thereof, he reasonably expected that the proceedings would be beneficial to his client.—9 Bing. 287.

Suffering judgment to go by default, is *prima facie* such negligence as will make an attorney liable, and he ought, therefore, to make some defense, unless he can clearly show that such a course was prudent, and was the best for his client which could, under the circumstances, be adopted; and the onus of proof, in such case, is on him.—1 Bing. 347.

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To an action brought by A. against B., an attorney at law, for negligence in not instituting a suit against C. to recover a debt due by C. (as alleged) to A., it is a good defense, that the debt was not really owing by C. to A. but to another person, at the time when the defendant was retained to institute suit.—1 Miles 31.

An attorney at law gave his client the following receipt: "Lodged in my hands, a judgment-bill granted by H. F. M. to H. H., for $1,200 due with interest since the 15th May, 1811, which is entered up in Bedford county, *which I am to have recovered, if that can be accomplished.*" At the date of the receipt he did not practice in Bedford county, but committed the collection of the money to a brother, who then resided and practiced in that county. Held, that he was bound to make good the collection of the judgment, so far as it was practicable by the application of reasonable diligence, skill and attention; and was liable for the neglect of the person employed by him for the purpose.—3 Penn. Rep. 224.

If the agreement had been merely that he would put the claim into the hands of some competent person for collection, and if he had done so, and informed the creditor of the name of such person, he would not have been accountable further.—*Ibid.*

Whenever an attorney disobeys the lawful instructions of his client, and a loss ensues, for that loss the attorney is responsible.—8 Mass. Rep. 51.

But when negligence is proved, the attorney may show that the plaintiff had another remedy for his debt.—3 Day's Conn. Rep. 390.

Where an attorney sues out a writ and neglects to prosecute it, he is liable.—15 Mass. Rep. 316.

If an attorney fail to collect money, and is sued, he is only responsible for the damages actually sustained by his client on account of such failure.—2 J. J. Marsh. 71.

When an attorney at law has been guilty of negligence, an action immediately lies against him; and when actual damages have been suffered by the plaintiff, they may be extended, if growing out of the negligence, to the verdict.—4 Peters, 174.

Two attorneys are in partnership; one receives money in behalf of the firm due to their client, of whom the client demands the money; this is a receipt by, and a demand of both, who are liable to the client jointly, without any demand upon, or notice to, the other.—2 Con. 253.

An attorney is not liable for money collected by him, until demand or direction to remit.—7 Wend. 320.

Declarations of the attorney made to third persons, not the agents of the plaintiff, nor in any manner connected with him in his business, that he intended to retain the money to indemnify him for a fraud which had been committed upon him by the plaintiff in the sale of a horse, are not to be considered such a refusal to pay as would dispense with the necessity of a demand.—7 Wend. 258.

An attorney who undertakes to collect a debt, is bound to sue out all process necessary to the object, and if he neglect so to do, he is answerable to his client for the injury sustained by him.—R. Metcalf's Dig. Mass. Rep. 60.

The chancellor will look with scrutiny into the dealings between attorney and client, and relieve against unconscientious bargains between them. It is an established ground of equitable jurisdiction.—11 Mon. Ky. Rep. 178.

An attorney and agent who purchases property sold to satisfy the debt of which he has the collection, and receipts therefor to the collecting officer, is liable to his client for the money and interest.—9 B. Monroe, 408.

Where an attorney neglected to bring suit on a promissory note, at the first term after it was placed in his hands for collection, in consequence of which

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neglect the claim was lost by the subsequent insolvency of the maker. Held, that the attorney was liable for the debt.—3 Howard, 314.

Contracts between lawyers and clients, are subject to severer scrutiny than those of ordinary men. If it appear that a client, suddenly discovering that he is in a perilous condition, by reason of an unexpected occurrence in relation to his counsel, is induced to agree to hard terms with certain lawyers, for want of time to seek the aid of others; or, if it appear that the client is persuaded by the attorney already retained to make such a bargain with others to be associated with him, as he would not have made but for that persuasion, the chancellor will relieve the client from the contract, or for the excess above a fair compensation for the service rendered.—2 Dana's Ky. Rep. 228.

V.—*Proceedings to remove him.*

(See R. S. vol. 2, p. 203.)

AUCTION.

I.—*General Principles.*

(See R. S., vol. 1, p. 299, 300, and notes.)

Parol declarations of an auctioneer cannot vary the printed terms of sale, unless such declarations were made known to the purchaser.—Pr. Dec. Ky. Rep. 137.

When at an auction, all the bidders except the purchaser are by-bidders, secretly employed by the seller, and the judgment of the purchaser is improperly influenced by their bids, the sale is a fraud, against which equity will relieve the purchaser. But when there are real bidders, as well as sham bidders, and the last bid before is a real bid, and their judgment of the real bid has not been blinded by the sham bidders, the sale is valid. (3 Story C. C. R. 612.) And it will be a void sale, if the purchaser prevail on persons attending the sale to desist from bidding, by appealing to sympathy, &c.—6 Moore's Rep. 316.

Where sales are made upon secret bids, (candlestick biddings,) or sealed proposals, as well as in sales upon open bids, any thing which prevents fair competition, or tends to give one party an unfair advantage over another, will be discountenanced.—11 Ill. Rep. 254.

The law requires good faith and fair dealing, as well in cases of sale by sealed proposals as by open bids. In both cases, effects and consequences are to be considered, in determining what fair dealing, and the true intent of the transactions require.—*Ibid.*

II.—*Rights and Liabilities of Auctioneers.*

An auctioneer has a special property in the thing he is employed to sell and a lien on it for the charges of sale, &c. He may sue the buyer for the purchase-money, and if he give credit to the vendee, and make delivery without payment, it is at his own risk. If the auctioneer have notice that the property he is about to sell does not belong to his principal, and he sell it notwithstanding, he will be held liable to the owner. So if the auctioneer do not disclose the name of his principal at the time of the sale, the purchaser is entitled to look to him personally for the completion of the contract, and for damages for its non-performance.—2 Kent, 536.

An auctioneer cannot in conducting a sale, deviate from the strict terms thereof; if he do, he will be personally responsible for all the consequences.—13 Price, 76.

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III.—*Rights and Liabilities of Buyer.*

A bidding at an auction may be retracted before the hammer is down.—3 Tenn. Rep. 148.

The writing his name as the highest bidder in the memorandum of sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, is a sufficient signing of the contract, within the statute of frauds, to bind the purchaser. Entering the name of the buyer by the auctioneer in his book, is just the same thing as if the buyer had written his own name. The purchaser who bids and announces his name to the auctioneer, gives the latter authority to write down his name.—2 Kent, 540.

BAILMENT.

A bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract express or implied, to conform to the object or purpose of the trust.—Story on Bail. ch. 1, sec. 2.

Bailments are usually divided into five kinds: 1, *Depositum*, or deposit; 2, *Mandatum*, or commission without recompense; 3, *Commodatum*, or loan for use without pay; 4, *Pignori acceptum*, or pawn; 5, *Locatum*, or hiring.

I.—*Deposit.*

This is a bailment of goods to be kept for the bailor and to be returned on demand, without recompense. The depositary is bound to keep them with reasonable care; and in the absence of a contrary agreement, he is only responsible for gross neglect, or in other words, for a violation of good faith. (2 Kent, 560.) The depositary cannot make use of the thing bailed without the consent of the bailor. (Story on Bail. 67.) The same care which the party bestows on his own goods seems to be all that is required of such a bailee, with three exceptions: 1. Where he specially undertakes to keep the goods safely. 2. Where he spontaneously and officiously proposes to keep the goods of another. 3. When the depositary is to receive a compensation for the deposit. In such cases he is responsible for ordinary neglect. (Jones on Bail. 37.) The depositary is bound to return the deposit to the rightful owner, with its profits and increase.—Jones on Bail. 38.

A bailee cannot, as a general rule, be sued by the bailor for the deposit till after demand and refusal; nor is the bailee always to deliver his deposit on demand.—*Underwood* vs. *Latham*, 1 Carter's Ind. Rep. 276.

The receiving of bank notes in a bank on special deposit, is as much a bank transaction as the receiving of them on general deposit; but the nature of these two kinds of deposits is very different.—*Coffin* vs. *Anderson*, 4 Blackf. 395.

When bank notes are received in bank on general deposit, they become the property of the bank, and their amount is a debt payable on demand by the bank to the person entitled to it. If payment in such case be afterwards refused, the creditor's only remedy is an action of debt or assumpsit against the bank.—*Ibid.*

But if the deposit of the notes be special, there is no change of property, and the deposit is nothing but a bailment. The conversion of such a deposit by the cashier is a *tortious* act, for which he is individually liable in an action.—*Ibid.*

Where the plaintiff as a constable, levied on two books belonging to the

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defendant, and left them in his possession on his agreeing to deliver them to the plaintiff at a future time, and the plaintiff met the defendant in a different town and there demanded them, and the defendant answered either that he had not got them, or he would not give them up, it was held that the evidence was sufficient to enable the jury to find a conversion of the books.—2 Denio Rep. 643.

A bailee, without reward, is guilty of gross negligence, if he omit that reasonable care of property committed to his charge, which persons in the like situation exercise, or which the bailee is accustomed to exercise in like cases. —3 Mason C. C. R. 132.

Gross negligence is to be considered with reference to the nature of the goods delivered to a bailee without reward. If money is delivered, it is to be kept with more care than common property.—4 Mason C. C. R. 515.

A depositary whose character is known to the depositor should not answer for mere neglect, if he take no better care of his own goods, and they also be spoiled or destroyed.—2 Wh. Am. Com. L. 121, note.

II.—*Mandates.*—(*Without Recompense.*)

Mandate is when one undertakes, without recompense, to do some act for another in respect to the thing bailed.—2 Kent, 568.

A mandatory is not answerable for omitting to do an act, and is only responsible for attempting to do it, and doing it amiss. (4 Johns. 84.) The same exceptions as to the degree of care requisite apply as well to this species of bailment as to that of deposit.

The books recognize two varieties of mandatories to which different rules apply: 1, a mandatory to carry; 2, a mandatory to perform work.

A mandatory to carry is responsible only for gross neglect, or a breach of good faith.

A mandatory to perform work is bound to use a degree of diligence adequate to the performance of it. If a man through strong persuasion and with reluctance undertake the execution of a mandate, no more care is required of him than a fair exertion of his ability.

III.—*Loans*—(*Without Fee.*)

This is a bailment or loan of an article for a certain time to be used by the borrower without paying for the use.—2 Kent, 573.

The borrower cannot apply the thing borrowed to any other than the very purpose for which it was borrowed, nor permit any other person to use the thing borrowed. 5 Mass. Rep. 104. Nor can he keep it beyond the time limited, nor detain it as a pledge for any claim he may otherwise have against the bailor. If the article perish, or be lost by accident, without any blame or neglect imputable to the borrower, the owner must abide the loss.—Jones on Bail. 49.

The borrower is bound to bestow the greatest care on the thing borrowed, and is answerable for the slightest neglect. But he is not liable for the loss of the thing by external and irresistible violence, unless he be guilty of some imprudence, as by travelling after night, in a dangerous road, &c. He is liable for inevitable accident, if he borrow the thing in order to save his own, concealing from the owner that fact; or when he detains the article over the time limited. —2 Kent, 576.

The ordinary expenses attendant on the thing loaned, are borne by the borrower; but extraordinary expenses, which arise from the infirmity of the article, or requisite for its preservation, without any neglect on the part of the borrower,

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the lender must bear, and the borrower has a lien on the article for his reimbursement.—2 Kent, 577.

If the borrower of goods for a particular purpose, not having the *indicia* of property other than its possession and control, transfer them in contravention of such purpose, to a *bona fide* purchaser without notice, the latter cannot resist the claim of the real owner.—*Ingersoll et al. vs. Emerson*, 1 Carter's Ind. Rep. 76.

A gratuitous bailment may be revoked at the pleasure of the bailor. 3 Johns. 432. But in Story on Bail. p. 181, the doctrine is held, that if the borrower sustain an injury, he will have an action against the lender, if the object of the bailment be partly accomplished.

IV.—*Pawns, or Pledges.*

This species of bailment is the delivery of property as security for some debt or engagement. The pawnee is bound to take only ordinary care of the article. If it be such as to be injured by use, as clothes, the person cannot use them. But if the things bailed be jewels, or such articles as are not liable to injury from use, the pawnee may use them, though at his peril. If the pawn be a charge upon the pawnee, as a cow, &c., he may use it in a reasonable manner; and if he derive any profits from the pledge, he must apply them toward the debt.—2 Kent, 581.

In New York, in the case of *Stief* vs. *Hart*, 1 Comst. Rep., it has been decided that a sheriff holding an execution against a pledgor, may, by virtue thereof, take the property pledged out of the hands of the pledgee, and sell the right and interest of the pledgor therein. The judges in the court of appeals were equally divided; hence, the decision of the court below was affirmed.

After the sale by the officer in such case, the pledgee is entitled to the possession of the property until the purchaser redeem it from that pledge.—*Ibid.*

The statute upon which this decision of the New York court is based, is similar to ours contained in the civil code, R. S., vol. 2, p. 135, sec. 436, except that the word "levy," in our statute, is omitted in that of New York.

The pledge covers the interest and all expenses. It may also extend to future advances.—16 Johns. 165.

The pledgee may collect the money due on a note of hand, in his own name.—15 Mass. Rep. 389.

A factor cannot pledge the goods of his principal.—4 Johns. 103.

A wife has no authority to pledge her husband's goods.—5 Pick. 178.

The goods pledged must be delivered.—R. S., vol. 1, p. 301.

The remedy of the bailee must conform to the agreement, if there be any; if there be none, under the old practice, when the time expired for a redemption of the pledge, he would have to obtain a decree of foreclosure, &c.; or, he might proceed to sell without judicial process, upon reasonable notice to the debtor to redeem. This last is the usual and most expeditious remedy. The creditor in all such cases is held at his peril, to deal fairly in giving the notice and making the sale. See 2 Johns. Ch. Rep. 62.

V.—*Hiring.*

This species of bailment consists of three kinds: 1, *for temporary use*, as where one hires a horse of another; 2, letting out goods for work and labor, care and attention to be bestowed upon them, as when one takes cloth to a tailor to be manufactured into a garment; 3, the delivering of goods to be carried from one place to another, which last is usually treated under the head of *common carriers*. We shall collect decisions on the subject of hiring, under these heads: 1, For temporary use; 2, For care, attention, mechanical skill, &c.; 3, Common carriers.

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1. For temporary use.—The hirer is bound to ordinary care and diligence, and is answerable only for ordinary neglect. He is bound to use the article with due care and moderation, and not apply it to any other use, or detain it for a longer period, than that for which it was hired. 2 Kent, 586. The bailee is not bound to prove affirmatively that he used due care.—*Ibid.*

Where in a case of joint hiring of a carriage, horse and driver, it being part of the contract that the carriage should be driven by the driver alone, one of the hirers assumed the office of driver, and, from his negligence, or want of skill, an injury was done to the carriage and a horse, all of the hirers were held liable to the owner.—2 Speer's S. Ca. Rep. 495.

A hirer, having charge of the property of another, is answerable for an injury which is caused by the omission of that care which a man of common prudence would have taken of his own concerns.—Gilpin's D. C. R. 585.

An owner of property let out to hire, is not entitled to indemnity for an injury it may sustain in the service in which it is used, unless such injury is caused by an abuse of it, or by such negligence as brings responsibility upon the hirer.—*Ibid.*

2. Care, attention, mechanical skill, &c.—[See post, title "Innkeepers." See ante, R. S. vol. 2, p. 240.]—Every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. If he perform the work unskillfully he becomes responsible in damages. (Bell's Com. vol. 1, p. 459.) Mechanics are bound to perform their work in a workmanlike manner. The bailee is answerable only for ordinary neglect.—*Ibid.*

Story in his work on Bailment subdivides this species into two others: 1. *Hire of labor and services.* 2. *Receivers of goods on deposit for hire*, such as warehousemen, innkeepers, forwarding merchants, &c. They are all responsible for want of good faith, and of reasonable care and ordinary diligence except innkeepers, and they are responsible for the slightest negligence.

Every bailee for hire who by his labor or skill imparts additional value to the goods, has a lien thereon for his charges, there being no special contract inconsistent with such lien.—4 Comstock's N. Y. Rep. 551.

The lien extends to all the goods delivered under one contract, and is not confined to the particular portion on which the labor has been bestowed.—*Ibid.*

Accordingly, where a quantity of logs were delivered on different days at the defendant's saw-mill, upon an agreement to saw the whole quantity into boards, and the defendant sawed a part of them and delivered the boards to the bailor without being paid for the service, *held*, that he had a lien for the amount of his account upon the residue of the logs in his possession.—*Ibid.*

As to the enforcement of the lien of this species of bailment and sale of goods bailed, see R. S. vol. 2, p. 240.

3. Common Carriers.—[See post, title "Common Carrier."]

VI.—*General Principles.*

The following is extracted from 2 Wheeler's American Com. Law, p. 121:

"The different degrees of neglect may be thus concisely defined and enumerated:

Ordinary neglect is the omission of that care, which every man of common prudence, and capable of governing a family, takes care of his own concerns.

Gross neglect is that want of care, which every man of common sense however attentive, takes of his own property.

Slight neglect is the omission of that diligence, which circumspect and thoughtful persons use in securing their own goods and chattels.

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A man cannot be compelled to perform his promise of engaging in a deposit or a mandate.

A reparation may be obtained by suit for damages occasioned by the non-performance of a promise to become a depositary or mandatory.

A borrower for use is responsible for slight negligence.

All bailees become responsible for losses by casualties or violence after their refusal to return the things bailed on a lawful demand.

A borrower or hirer is answerable at all events if he keep the thing borrowed or hired after the stipulated time, or use them differently from his agreement.

A depositary or pawnee is answerable under all circumstances if he use the thing deposited or pawned."

When property is bailed, a demand of it at the house of the bailee in his absence, is not evidence of a conversion, unless made under circumstances raising a presumption of actual notice to the bailee before the suit was commenced.—3 N. H. R. 546.

When trover is brought by the owner of goods against one who took them from a bailee, the defendant cannot set up any lien belonging to the bailee.—2 N. H. R. 319.

In case of mixture of property from necessity, the full value is given to the injured party.—1 Har. and Gill. 11.

A wrongful sale of property by a bailee is a conversion in both the seller and purchaser, for which the bailor may maintain an action against both.—21 Vermont Rep. 204.

If the bailee of property sell it to an innocent purchaser, his sale does not transfer the property to the purchaser; but the bailor may have his recourse against the bailee, or against the vendee.—Harden's Ky. Rep. 531.

A bailor may countermand his bailment at any time.—11 Mass. Rep. 211.

A misuser terminates a bailment.—2 Sand. Rep. 47.

BILLS OF EXCHANGE.

I.—*General Principles.*

A bill of exchange is an open letter of request from, and order by, one person on another, to pay a sum of money therein mentioned to a third person, on demand, or at a future time therein specified.—Selwn. N. P. 285.

Bills of exchange are either *foreign* or *inland*. *Foreign* are those drawn by a person out of, on another in, the United States, or *vice versa*; or by a person in a foreign country, on another person in a foreign country; or by a person in one State on another in another of the United States. Some of the authorities are that a bill drawn in the United States, upon any place in the United States, is an inland bill. 5 John. R. 384. But an *inland* bill is generally defined to be one drawn by a person in a State, on another in the same State. The principal difference between a foreign and inland bill is, that the former must, and the latter need not, be protested. Chit. Bills, 14. On p. 379, sec. 7, R. S., vol. 1, a distinction as to damages is made in reference to bills drawn within and those drawn without the United States, the former being subject to five per cent. damages on protest, and the latter to ten per cent. And on same page, sec. 9, it is provided that if the bill be payable in the United States, the rate of exchange shall not be taken into account.

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II.—*Parties.*

The parties are a *drawer*, or he who makes the order; the *drawee*, or the person to whom it is addressed; the *acceptor*, or he who accepts the bill; the *payee*, or the party to whom, or in whose favor, the bill is made. The *indorser* is he who writes his name on the back of the bill; the *indorsee* is the one to whom the bill is transferred by indorsement, and the *holder* is, in general, any one of the parties who is in possession of the bill.—1 Bouv. Law Dic. 202.

III.—*Form.*

Bills of exchange should be in writing; for the payment of money, not merchandise; be payable at all events, not upon a contingency; be properly dated, at a place and time, and contain an order or request to pay; of right, and not of favor. The superscription ought to mention the sum. The time of payment should be expressed in the bill; if no time be mentioned, it is considered as payable on demand. The drawee may fix a place of payment by his acceptance.

An order to "deliver money," or a promise that "A. B. shall receive money," or "to be accountable," or "responsible," have been held sufficient as to form. 8 Mod. 364; Chit. Bills, 171-2. The bill ought to specify to whom it is to be paid.—2 Pard. 338.

When the name of the payee is in blank, the holder may fill the blank with his own name; but, until it is so filled up, a suit will not lie on it against the acceptor.—*Greenhow* vs. *Boyle*, 7 Blackf. 56.

In an action for money had and received, &c., by the drawer against the acceptor of such blank bill, the bill is not sufficient evidence to support the suit.—*Ibid.*

A bill drawn on an administrator in these words, "Please to settle 80 dollars out of my part of the estate, with Nathan Harness, and this my order shall be your receipt for the same," is not a valid bill of exchange, being payable only out of a particular fund.—*Mills et al.* vs. *Kuykendall*, 2 Blackf. 47.

A declaration against the acceptor of such a bill, depending alone for its support upon the bill and acceptance, contains no cause of action, whether the acceptance be absolute or conditional.—*Ibid.*

IV.—*Indorsement.*

Writing one's name on the back of a bill of exchange, is usually called an indorsement, as where the payee transfers a bill to another person, he becomes then the *indorser*, and the person to whom it is transferred is the *indorsee*, or *holder*. An indorsement is said to be in *full*, when the name of the indorsee is mentioned in the transfer; in *blank*, when the name of the indorser is not mentioned. A blank indorsement is made by writing the name of the indorser on the back of the bill; a writing or assignment on the face of the bill would be considered an indorsement.—Chit. Bills, 170.

If the indorsee of a bill of exchange give time to the drawer, for a valuable consideration, he thereby discharges the indorser.—*The State Bank* vs. *Wymond et al.*, 7 Blackf. 363.

The indorser of a bill of exchange cannot maintain a joint suit against the drawer, acceptor and indorsee of the bill.—*Pierce et al.* vs. *Eustis*, 6 Blackf. 159.

The first indorser is liable to every subsequent *bona fide* holder, even though the bill or note be forged, or fraudulently circulated.—4 Mass. 45.

In case of blank indorsements, possession is evidence of title; but if the indorsements are filled up, the first indorsee cannot sue without showing that he had taken up the bill or note. The acceptor or maker is liable only to the last indorsee.—2 Kent, 90.

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On page 378, R. S., vol. 1, provision is made as to what written instruments are assignable, and for the relative rights of assignee, indorser and maker. But so far as bills of exchange are concerned, sec. 5, same page, expressly excepts them from the provisions of the two preceding sections, leaving them to be governed in that respect by the law merchant. That law requires, as will be seen by reference to post, title "Demand and Protest, and notice thereof," that every bill of exchange should be presented in a reasonable time to the drawee for acceptance; that demand should be made for payment, on the third day after the bill falls due, but may be made on any of the days of grace,—that is, the days allowed after the bill is due, for payment; that, then, in case of non-payment, notice thereof should be sent to the indorser on the next day after the days of grace expire.

These are a few of the leading features of the law merchant, concerning the steps to be taken to render the indorser liable. Instruments not negotiable by that law, but made so by statute, are governed by different rules in this respect, for which see title "Notes, Promissory," R. S., vol. 1, p. 378, and notes appended to that act.

V.—*Acceptance.*

An acceptance is an agreement to pay the bill according to the tenor thereof. It may be either in the bill itself, or on some collateral writing, as a letter, &c.—Stra. 648.

An agreement to accept a future bill is valid. Any words, if in writing, showing the party's assent, will amount to an acceptance.—Chit. Bills, 73.

An acceptance may be either absolute, conditional or partial. An *absolute* acceptance is an agreement to pay the bill according to its tenor; a *conditional* acceptance is an engagement to pay only on a contingency; a *partial* acceptance varies from the tenor of the bill, as to pay part, &c.—Chit. Bills, 226. 1 Camp. 425. Acceptance *supra protest* is an acceptance after protest for non-acceptance by the drawee, or of an indorser.—5 Camp. 447.

If the payee of a bill of exchange, accepted for the drawer's accommodation, give time to the drawer without the acceptor's knowledge, the latter is not thereby discharged, though the payee knew that the acceptance was made for the drawer's accommodation.—*Lambert* vs. *Sandford*, 2 Blackf. 137.

Bills must be presented to the drawee for acceptance within a reasonable time, or the drawer will be released from responsibility. What would amount to an unreasonable delay is to be gathered from the circumstances of the case, and is a question of fact for the jury.—7 Cowen, 705; 9 Bing. 416.

A parol promise to accept a bill already drawn or thereafter to be drawn, is binding if the bill be purchased in consideration of the promise. It is an original promise, not in conflict with the statute of frauds.—3 Kent, 85.

An acceptor is bound though he accepted without consideration.—1 Bing. N. C. 267.

An acceptor *supra protest* stands in the light of an indorser, and has the same remedies, and can, of course, sue the drawer and indorser.—1 Esp. N. P. 112.

If the drawee cannot be found at the proper place, the holder may cause the bill to be protested; and if the drawee be dead, the bill may be presented to his executor or administrator.—Bayley on Bills, 128.

The acceptance must be made within twenty-four hours after presentment, or the bill may be treated as dishonored; and if the drawee keep the bill a great length of time contrary to his usual course of dealing, an acceptance may be implied.—Chit. Bills, 7. 1 Campb. 425.

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If acceptance be refused an action may be immediately commenced against the drawer.—Chit. Bills, 72.

To authorize the payee to recover against the drawer of a bill of exchange in which no time for payment is specified, he must present the bill to the drawee for acceptance or payment within a reasonable time after it is received. —*Dumont* vs. *Pope et al.*, 7 Blackf. 367.

A statement in a protest of such bill for non-acceptance, that the reason given by the drawee for non-acceptance was that he had no effects of the drawer, is no evidence of the want of effects.—*Ibid.*

If an order, drawn by A. upon B. be not a bill of exchange, there can be no recovery by the payee against the drawer without proof of consideration.— *Ibid.*

The State Bank of Indiana, through one of its branches, received a bill of exchange from an indorser, before it was due to be collected for him for a reasonable reward, but afterwards failed to present the bill to the drawee either for acceptance or payment. Held, that the bank was liable to the indorsee for the damages he had sustained in consequence of the failure to present the bill.—*Lyson* vs. *The State Bank*, 6 Blackf. 225.

The drawee of a bill of exchange is bound to know the handwriting of the drawer; and if he pay the bill to a *bona fide* holder, he cannot recover the money back although the note turns out to be a forgery.—4 Com. N. Y. Rep. 147. And the same rule applies to intervening parties.—*Ibid.*

VI.—*Demand and Protest, and notice thereof.*

The demand of acceptance of a foreign bill, is usually made by a notary, and in case of non-acceptance, he protests it. It must be made at the time, in the manner, and by the persons, prescribed, in the place where the bill was payable. —3 Kent, 93.

It is not generally deemed necessary to protest an inland bill in this country, though the practice is to have bills drawn in one State on persons in another, protested by a notary.—*Ibid.*

After the protest for non-acceptance, immediate notice must be given to the drawer and indorser.—*Ibid.*

If the bill has been accepted, demand for payment must be made when the bill falls due, and must be made by the holder or his agent, upon the acceptor, at the place appointed for payment, or at his house, or upon him personally, if no particular place be appointed, and it cannot be made by letter through the post office.—*Ibid.*

A bill of exchange drawn by a person resident in this State, payable in New Orleans, and directed to himself in that city, was protested for non-payment. Held, that the drawer was liable to five per cent. damages on the bill.—*The State Bank* vs. *Bowers et al.*, 8 Blackf. 72.

The inquiry will always be, has due diligence been used? If the party has absconded, that will, generally, excuse the demand. 4 Mass. Rep. 45. If he has changed his place of residence in the State, the holder must endeavor to find it, and make demand there. If he has removed out of the State, subsequent to accepting the bill, it is sufficient to present the same at his former residence. If the place of payment be designated in the note, demand must be made there. 3 Kent, 97-8. A holder of a bill of exchange is not bound to receive an acceptance to pay at a particular place; but if he do, he must make demand at the place appointed.—4 Pick. 385.

The R. S., vol. 1, p. 379, allow three days of grace on all bills payable within

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the State,—that is, the drawee or acceptor is allowed three days after payment is due, to meet the bill. Demand must be made on the third day. If that day fall on Sunday, or fourth of July, the demand must be made on the day previous. A presentment at a banking-house, after banking hours, is not sufficient. 6 Peters' Rep. 250. It is sufficient evidence of a demand and refusal to pay a note payable at a particular place, if the note is left there, and no funds are provided to take it up.—7 Wend. 160.

In order to hold responsible indorsers and drawers of bills, due notice must be given of the default of the drawee. The notice must be put into the post office the day after the third day of grace. If the demand is made on Saturday, notice may be mailed on Monday. Putting the letter containing the notice of protest in the post office, is sufficient, though the letter miscarry. Notice may be sent by a private conveyance, or special messenger. Or, it may be left at the dwelling house, in a way reasonably calculated to bring the knowledge home to the party for whom it is intended. There is no precise form of notice. It must specify that the bill is dishonored; and it may come from any person having possession of the bill, or an agent. The party receiving notice is bound to give notice with the same diligence to those behind him, to whom he looks for indemnity. It is not necessary that a copy of the bill and protest should accompany the notice. —3 Kent, 106–7–8.

If the drawee refuse to accept, because he has no effects of the drawer, notice to the latter is not necessary. But this exception applies only to the drawer. Neither the insolvency of the drawer or drawee, or acceptor, or the fact that the drawee had absconded, or knowledge in the indorser, when he indorsed the paper, of the insolvency of the maker of the note, or drawee of the bill, do away with the necessity of notice. 3 Kent, 108–9–10. And the burden of proof to prove that the drawer had no effects in the hands of the drawee, lies on the holder.—2 Marsh. 152.

Giving time by the holder to the acceptor, will discharge the other parties, if that agreement has a sufficient consideration, and is binding in law upon the parties. A mere forbearance to sue, or taking collateral security, is no discharge.—*Ibid.*

Even if due notice be not given of non-acceptance or non-payment, yet a subsequent promise to pay, by the party entitled to notice, will amount to a waiver of a want of demand or notice, if that promise is made clearly and unequivocally, and with a full knowledge of the want of diligence on the part of the holder.—*Ibid.*

Notice left at a boarding house with a fellow boarder, is sufficient.—6 Peters, 250.

Notice by mail is sufficient, if sent to the post office where the indorser or drawer usually resorts.—4 Wend. 328.

If the residence of the indorser is known, notice should be left there, and if he has given directions where to send notice, any deviation therefrom will be at the risk of the holder.—7 Halst. 268.

Where the drawer of a bill is a partner in the house on which it is drawn, it is not necessary to prove notice to the drawee.—20 Johns. 176.

When a demand cannot be made on the drawee, notice must nevertheless be given to the indorser, and that within as short a period after having ascertained that the demand could not be made, as if it had been made.—6 Pick. 80.

Each party through whose hands a dishonored bill may pass, is allowed an entire day for the purpose of giving notice.—1 Camp. 82.

If there be no notary, the protest and demand may be made by any substantial person in the place, in the presence of two substantial witnesses, between sun-

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rise and sunset. It is sufficient to note the protest on demand, and it may be drawn up in form at a future period.—3 Kent, 93.

BONDS.

(See R. S. vol. 1, p. 166, for *official bonds*; p. 57, R. S. vol. 2, for *replevin-bonds*; p. 60, R. S. vol. 2, for *injunction-bonds*; p. 127, R. S. vol. 2, for *bonds for costs*; p. 138, R. S. vol. 2, for *delivery-bonds*; and p. 159, R. S. vol. 2, for *appeal-bonds*.)

On p. 90, R. S. vol. 2, distinctions between sealed and unsealed instruments, are abolished. Thus have a few, brief, expressive sentences, consigned to a common grave an immense, unwieldy mass of subtle, complex, and not unfrequently meaningless judicial decisions, heretofore clogging the avenues to justice, and unnecessarily complicating commercial transactions. It is to be hoped that the adieu we have bid is final. The following decisions are, however, deemed of sufficient importance to refer to here, since they involve none of the old technical distinctions:

Suit on a bond. Plea, payment. Held, that the plaintiff, to rebut the presumption of payment from lapse of time, might prove that, pending the suit, the defendant proposed to the plaintiff's attorney to pay the bond in property. —*Smith* vs. *Buskirk*, 7 Blackf. 477.

A written promise of indemnity, whether under seal or not, is, under the statute, assignable.—*Fletcher et al.* vs. *Piatt*, 7 Blackf. 522.

A bond conditioned to indemnify the obligee and save him harmless from the operation of certain judgments, which were liens on land purchased by him, is a bond of indemnity against damages arising from the judgments.—*Loyd et al.* vs. *Marvin et al.*, 7 Blackf. 464.

A bond to indemnify an officer against a lawful or an apparently lawful act is valid. *Aliter*, if the act be unlawful.—*Anderson* vs. *Farns*, 7 Blackf. 343.

Whether a bond sued on was delivered as an escrow, and whether an alteration made in it after its delivery destroyed its identity, &c., are questions for the jury; and to enable the jury to determine those questions, they should have the bond before them.—*The State* vs. *Bodly et al.* 355.

A suit was commenced in 1837 on a bond executed in 1810 at Vincennes in this State, where the obligor resided, conditioned to make the plaintiff a title for certain land by the first of July, 1811. Soon after the day last named, the plaintiff, who resided in another State, came to Vincennes and demanded of the obligor a title for the land, but did not obtain it—the obligor himself not having the title. The plaintiff then returned home. The obligor, who was always able to pay his debts, continued to reside at Vincennes until his death in 1821; and his legal representatives have resided there ever since. Held that, under these circumstances, it might be presumed that the bond was paid.—*Rogers* vs. *Bishop et ux.* 5 Blackf. 108.

To avoid a bond on the ground that it was fraudulently obtained, it should appear that the obligee had an agency in the alleged fraud.—*Jenners* vs. *Howard*, 6 Blackf. 240.

One of two obligees cannot assign his interest separately, so that his assignee and the other obligee will be the legal holders of the bond.—*Boyd* vs. *Holmes*, 1 Carter's Ind. Rep. 480.

A plea that the bond was executed under a mistaken impression of its legal effect made on the defendant's mind by the plaintiff, is bad.—*Miller* vs. *Elliott*, 1 Carter's Ind. Rep. 484.

A bond cannot be delivered as an escrow to the obligee.—2 Carter's Ind. Rep.

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COMMON CARRIERS.

I.—*Who are.*

Persons carrying goods for hire for all persons, indifferently, are common carriers.—1 Pick. 50.

Ferrymen are common carriers.—12 Ill. Rep. 344. All persons who transport goods from place to place, for hire, whether usually or occasionally, whether as a principal or an incidental and subordinate occupation, are common carriers.—2 Texas Rep. 115. So are the owners of steamboats engaged in the carrying trade.—1 Smede's & Marsh. 279. So are those who make a business of transporting goods from place to place (by themselves or servants,) including draymen, cartmen, porters, &c.—2 Dana's Ky. Rep. 430. So are the proprietors of stage coaches, and railroad cars, which ply between different places, and carry goods for hire.—5 Rawle Rep. 179. So are canal boatmen and bargemen.—6 Wend. 2, 325. So are the owners and masters of ships.—10 Johns. 1. So are the owners of steamboats, who undertake for hire to tow boats, but are only liable for ordinary care, skill and diligence.—2 Kent, 598.

A person who is at the same time a common carrier, and a fowarding merchant, and receives goods into his warehouse, to be forwarded according to the future orders of the owners, is not liable as a common carrier, if the goods are lost by fire before such orders are received.—7 Cowen's N. Y. Rep. 497. Nor is a private person who carries for hire as a casual occupation.—1 Wend. 272. Nor is a forwarding merchant.—7 Cowen, 497; 12 Johns. Rep. 232. Nor is the hirer of a vessel, unless for the time he have the entire control of it.—4 Greenl. 264. Nor is necessarily one who *contracts* to transport goods from one point to another, and deliver them in good order, unavoidable accidents only excepted; but he is responsible to the same extent under his contract.—2 Kelley's Ga. Rep. 352.

To make a person a common carrier, he must exercise it as a common employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of goods for hire as a business, and not as a casual occupation.—*Ibid.*

II.—*When liable.*

1. GENERALLY.—It is a general rule recognized in 5 Blackf. 222, that common carriers are liable for all losses of goods intrusted to their care, except those occasioned by unavoidable, inevitable accidents, or acts of God and public enemies.

Where armed persons entered on board a vessel in the night time, under pretense of impressing seamen, and plundered the vessel; and where a quantity of hops were destroyed by fire raging with irresistible violence, which originated one hundred yards from the place where they were placed, the carriers were held liable.—1 T. R. 271; 2 Kent, 603. So is he liable where he is stalled in a ford, the bridge being impassable.—1 Harp. S. C. Rep. 468. So, if goods are improperly placed on the deck of a vessel, and a loss ensue. If a common carrier receive goods into his own warehouse for the accommodation of himself and customers, for the purpose, merely, of facilitating the carriage, his liability as a common carrier commences with the receipt of the goods.—1 T. R. 27. So is an inn-keeper, who is at the same time a carrier, liable for goods sent to him for transportation.—5 T. R. 389. So are common carriers responsible for the acts of mere strangers, in regard to the property intrusted to them.—3 Doug. 389. A carrier is responsible for the acts of his servants or agents.—2 Stark.

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Rep. 82. When by usage it is the duty of the master of a vessel to sell the goods intrusted to him, he is liable for the money received.—11 Johns. 107. But in such cases there must be evidence of such usage.—Story Bail. 250. So if he deviate from the voyage, he is liable, even though the loss be occasioned by inevitable accident.—12 Conn. Rep. 410. A loss by worms eating a vessel, is not a peril of the sea.—2 Mass. 429. A common carrier is liable for all accidents which can occur by human agency, except acts of public enemies, whether any negligence be proved or not.—1 Murphy N. Ca. Rep. 173. Where a cargo received injury by steam, and it appeared that the steam escaped through a crack in the steam boiler, occasioned by the frost, it was held that at the season of the year in which such injuries by frost are likely to occur, it is gross negligence in the carrier to fill up his boiler with water over night, without keeping a suitable fire to prevent such accidents.—4 Bing. 607.

A common carrier, or a private person who undertakes for hire to carry and deliver goods safely, is bound to pursue the usual and ordinary route. If he unnecessarily deviate from that route, he will be liable for any injury to the goods which may thereby be occasioned.—*Powers* vs. *Davenport*, 7 Blackf. 497.

An exception contained in a bill of lading of a common carrier by land of "unavoidable dangers and accidents of the road," is not a restriction of his general liability.—*Walpole* vs. *Bridges*, 5 Blackf. 222.

Where the undertaking was to stop to re-ship at a certain point, and the carrier stopped short of that point, and the goods were lost, he was held liable, even though the dangers of the river were expressly excepted in the undertaking.—4 B. Monroe's Rep. 263. Loss by fire on a boat is not one of the dangers of the river.—1 Smede's & Marsh. R. 279.

Owners of steamboats who convey horses from point to point are responsible as inn-keepers; and when a horse escapes from his fastening and is lost overboard, the owner of the horse is liable.—8 Hump. Tenn. Rep. 497.

Where the defendant, who was a common carrier, received from the plaintiff a package of money, to carry it from S. to P., and deliver it at the bank in P. it appeared that when the defendant arrived at P., the bank was shut; that he went twice to the house of the cashier, and not finding him at home, brought the money back, and offered it to the plaintiff, who declined to accept it, and that the defendant then refused to be further responsible for any loss or accident; it was held that in the absence of any special contract, (none being proved in this case,) these facts did not constitute a legal excuse to the defendant for the non-performance of his undertaking.—17 Connect. Rep. 138.

S. & S., whose principal business was that of farming, but who, a part of the time, and during the season for hauling, occasionally run their wagon for hire, received certain bales of cotton, which they undertook to haul to Nacogdoches. On the road some of the ropes broke, and the bales partially burst open. On the night the cotton was destroyed, the wagon was placed within fifteen feet of the camp fire, which was renewed at midnight, at which time no wind was blowing. Tho cotton was discovered to be on fire about day break, and burning furiously. The wind had then arisen, and was blowing the camp fire towards the cotton. This was in December. Held, that they were liable for the loss as common carriers.—2 Texas Rep. 115.

Unavoidable, is synonymous with *inevitable*; and inevitable or unavoidable accidents are the same with *the acts of God*,—which means any accident produced by physical causes, which are inevitable; such as lightnings, storms, perils of the sea, earthquakes, sudden death, illness.—2 Kelley's Ga. Rep. 256.

A common carrier is in the nature of an insurer of goods intrusted to his

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care, and is responsible for every injury sustained by them, occasioned by any means whatever, except only the *act of God*, and *the King's enemies*.—*Ibid*, 357.

2. Commencement of liability.—The liability of a common carrier commences whenever there is a complete delivery of the goods to him or his agents; and if according to the usages of business, it be a sufficient delivery to leave the goods on the dock, by or near the carrier's boat, yet this must be accompanied with express notice to the carrier.—6 Cowen's Rep. 757. And he is bound, upon a tender of reasonable compensation, to carry all goods offered him, unless because his vehicle is full; the goods be of a character which will at the time expose them to extraordinary danger, or to popular rage; because they are not of a sort which he is accustomed to carry; because he has no convenient means of carrying such goods; because they are brought at an unseasonable time; or because of other reasonable grounds of excuse.—Story Bail. 328. But a carrier is not bound to receive goods until he is ready to set out on his journey, unless he be also a warehouseman.—1 Com. R. 105. Where goods were left in the yard of an inn, where the carrier put up, but no actual delivery to him or his servants, it was held not a sufficient delivery. So where goods were delivered at a wharf to an unknown person, and no knowledge of the fact was brought home to the wharfinger or his agents. So where goods are actually put into a wagon or barge of a carrier, he will not be chargeable if it appear that there is no intention to trust him with the custody; as if the owner is uniformly in the habit of placing his own servant on board as a guard, who exclusively takes upon himself the management and custody of them. Story Bail. 341.

3. Termination of liability.—As soon as the goods have arrived at their proper place of destination, and are deposited there, the responsibility of the carrier terminates.—2 Kent, 604. He is responsible for any loss occasioned by depositing in an intermediate warehouse.—*Ibid.* If the carrier undertake specially to deliver the goods to the consignee, he is liable at all events if the delivery be not made.—2 Esp. R. 693. If the owner, or consignee request the carrier to let the goods remain in the warehouse till he call for them, the liability of the carrier will terminate as soon as the goods are delivered at the warehouse.—8 Taunt. R. 443. So if they be directed to be left at the wagon office, or put on board a lighter.—Story Bail. 345. The manner of the delivery depends very much on the usage of the place.—*Ibid.* In the absence of such usage, and a special contract, he is bound to make a personal delivery.—2 Kent, 604. Carriers are bound to give notice to the owner or consignee of the arrival of the goods, except in case of a contrary special contract or usage. And they must deliver them to the right person.—3 Wils. R. 429. The goods are bound to be delivered in a reasonable time. If they finally arrive, however, and the carrier has used reasonable diligence, he will not be liable for delay. As where the delay is occasioned by a canal being blocked up with ice.—4 Whart. R. 204; 14 Wend. 215; 12 Ill. Rep. 477. Neither is he obliged to send on the goods by other means.—*Ibid.* Where the goods are denied admittance because they are prohibited articles, the carrier's liability does not end until they are returned to the owner.—6 Johns. R. 170.

It is a general rule that a common carrier is bound to deliver the goods intrusted to him to carry, personally to the consignee, at the place of delivery: but in certain cases where the transportation is by vessels or boats, notice of the arrival and place of deposit is sufficient, and comes in place of a personal notice; and where goods are safely conveyed to the place of destination, and the consignee is dead, absent, or refuses to receive, or is not known and cannot, after reasonable efforts, be found, the carrier may discharge himself

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from further responsibility, by placing the goods in store with some responsible third person in that business, at that place, for and on account of the owner. In such a case, the store-house keeper becomes the agent, or bailee of the owner of the property.—1 Denio's N. Y. Rep. 45.

An offer to deliver freight or passengers' baggage, made at a proper time, (though declined,) discharges the master and owners from liability as common carriers: and if the freight still remain in their custody, they hold it as *mere bailees*, accountable according to the terms, express or implied, of the bailment.—3 Dana's Ky. Rep. 93.

III.—*When not liable.*

1. GENERALLY.—They are not liable for acts of God and public enemies. Under the expression "acts of God" are comprehended all misfortunes and accidents arising from inevitable necessity, which human prudence could not prevent, (1 Con. R. 487,) such as lightning, earthquakes and tempests. In bills of lading, etc., the words "perils of the sea" are often inserted to limit the liability of the carrier. These words have uniformly been construed to mean inevitable accidents. A loss by a collision between two boats when there is such a bill of lading comes within that class unless occasioned by negligence.—12 Smede's & Marsh. R. 599; 3 Esp. R. 67. Losses by robbery &c., are not acts of public enemies; but those occasioned by pirates are.—Story Bail. 512. A loss occasioned by a sudden change of wind, is deemed an act of God.—6 Johns. 160. If goods are destroyed by throwing them overboard for the preservation of vessel and crew, the carrier is not liable.—1 Caine's R. 43. So, if the vessel strike on a rock not generally known, if there is the absence of negligence.—1 Conn. Rep. 487. A carrier from New York to Troy, with instructions to forward by canal-boat, is not liable for a loss on the canal.—8 Cowen, 223. Nor are carriers liable for the ordinary wear and tear and loss, by rotting, evaporation, spontaneous combustion, &c.—3 Kent. 299.

When there is no notice, the party who sends goods is not bound to disclose their value, unless asked. But if the carrier inquire, and a false answer be given him, and he is deceived, he will not be responsible. But if he make no inquiry, and no artifice is made use of to mislead him, he will be responsible, no matter what the value may be.—Story Bail. 362.

2. LIMITATION OF LIABILITY BY NOTICE.—It is now well settled that by special contract or notice the extent of the liability of a common carrier may be limited; but in all such cases the notice must be clear, explicit, free from ambiguity, and be actually brought home to the knowledge of the party intrusting goods to him.—Story Bail. 356; 2 Kent, 605. The mere advertisement of the carrier's terms, unless seen and understood by the owner, will not be sufficient.—2 Stark. R. 279. Publishing in a newspaper, posting up placards in the carrier's office, have been held insufficient unless the contents were actually known to the owner.—*Ibid.* And where there are two notices, that which contains terms the least beneficial to the carrier will prevail.—*Ibid.* Nor will notices at the termini of roads bind persons consigning goods at intermediate points, unless they actually know their contents.—3 Camp. 27. But in no instance can the carrier exonerate himself from liability for the consequences of gross neglect, such as defective boats, coaches, wagons, &c., inattention of servants, &c.—19 Wend. 251; 13 Wend. 611. Notice is of no avail if the carrier send the goods by a different conveyance.—1 Const. S. Ca. R. 114.

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IV.—*Measure of damages.*

In 4 Blackf. 266, in the case of *Wallace* vs. *Vigus*, it is decided that the measure of damages in case of loss of goods by common carriers, is the wholesale price of the goods at the place where they were contracted to be delivered, deducting freight. In many instances the amount of damages is reduced by proof of the condition of goods when shipped. A carrier is not estopped from showing that goods shipped in boxes were damaged before they came into his possession.—9 B. Monroe's R. 113. Where the consignee refused to receive damaged goods from the carrier, and he sold them, it was held that he was responsible to the consignee or owner for so much of the price as would indemnify, which was not paid by the insurer.—4 B. Monroe, 267. And in 20 Ohio Rep. 318, it has been held that the owner of a trunk, lost by a common carrier, and his wife, are competent witnesses to prove the contents and their value; but the rule only extends to such articles as are commonly carried in a travelling trunk. The questions of negligence, or causes of loss, and amount of damages, are questions for the jury; though what acts, which exonerate a carrier, are mixed questions of law and fact for the jury.—6 Johns. 160.

V.—*Compensation.*

The carrier has a right to his freight in advance; he has also a lien on the goods in possession, and may have his action against both consignor and consignee.—17 Johns. 134.

His lien continues only while the goods are in the possession of the carrier. —*Ibid.*

In case there is no special agreement, the carrier can only recover the usual charges. A common carrier is also entitled to compensation for expenses necessarily incurred in taking care of goods in cases of storms, floods, &c.—Story Bail. 371.

VI.—*Carriers of Passengers.*

(See R. S. vol. 1, p. 426.)

Hackney coachmen, who carry passengers *solely*, are not common carriers; but where proprietors of coaches, &c., carry baggage of passengers also, they are regarded as common carriers, and held to the same strict accountability, so far as the baggage was concerned.—13 Wend. 611. But where there was a large sum of money in the trunk lost, it was held that the carrier was not liable for it. —9 Wend. 85. Common carriers of passengers are bound to admit all on board who apply, whom they can reasonably accommodate, except those who refuse to obey the reasonable regulations of the boat, are guilty of gross and vulgar habits of conduct,—make disturbances on board; or those whose characters are bad or suspicious; or those whose object it is to interfere with the interest or patronage of the proprietor.—Story Bail. 375. Carriers of passengers, (owners &c.) are bound to provide competent vehicles, suitably equipped, with careful and skillful managers, &c.; to use all precautions for the safety of passengers; and they are answerable for the slightest neglect in themselves or servants.—2 Kent, 601. A carrier of passengers is bound to use the highest degree of care that a reasonable man would use.—13 Conn. Rep. 319.

The proprietors of a stage-coach, who hold themselves out as common carriers of passengers, are bound to receive all who require a passage, so long as they

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have room, and there is no legal cause for a refusal. And it is not a lawful excuse that they run their coach in connection with another coach which extends the line to a certain place, and have agreed with the proprietor of such other coach not to receive passengers who come from that place, on certain days, unless they come to his coach.—10 N. Hamp. Rep. 481.

The defendant was one of the proprietors, and the driver of a stage coach running daily between Amherst and Nashua, which connected at the latter place with another coach running between Nashua and Lowell, and thus formed a continuous mail and passenger line from Lowell to Amherst, and onward to Francestown. A third person run a coach to and from Nashua to Lowell, and the defendant agreed with the proprietor of the coach connecting with his line that he would not receive passengers who came from Lowell to Nashua in the coach of such third person, on the same day that they applied for a passage to places above Nashua. The plaintiff was notified at Lowell of this arrangement but notwithstanding come from Lowell to Nashua in that coach, and then demanded a passage in the defendant's coach to Amherst, tendering the regular fare. Held that the defendant was bound to receive him, there being sufficient room, and no evidence that the plaintiff was an unfit person to be admitted, or that he had any design of injuring the defendant's business.—*Ibid.*

CONTRACTS.

(See post, damages, demand, fraud, infants, and warranty. For contracts for sale of land, see ante, R. S. vol. 2, p. 214.)

A contract is an agreement of two or more persons, upon a sufficient consideration, to do or not to do a particular thing.—2 Blacks. Com. 442.

The distinction between sealed and unsealed instruments is abolished, so far as evidence is concerned. See ante, R. S. vol. 2. p. 90.

An *express contract* is one in express words or by writing. An *implied* contract is one which the law raises or presumes.—2 Kent, 450.

An *executed* contract is one the terms of which have, and *executory* where they have not been complied with.

I.—*Parties and Consideration.*

(As to the contracts of married women and infants, see "husband and wife," and "infants.")

Imbecility of mind when there is an essential privation of the reasoning faculties, or an incapacity of understanding and acting in the ordinary affairs of life, whether it result from lunacy, or intoxication, is a sufficient cause to set aside a contract.—2 Kent, 451; 6 Blackf. 240. So will violence to *the will*, or the influence of undue restraint.—6 Mass. Rep. So will fraud, concealment, and mistake as to the subject matter of a contract.

Although an assignment by A. to B. of an agreement, be objectionable on account of A.'s intoxication when he executed it, the objection will not affect B.'s subsequent assignment of the agreement to C. without notice.—*Campbell vs. Breckenridge et al.*, 8 Blackf. 471.

Every contract must have a sufficient consideration, without which it is not binding in Law.—4 Johns. Rep. 235. There is but one exception to this rule and that applies to negotiable instruments in the hands of an innocent indorsee.—Johns. Ch. Rep. 54. Any damage, or suspension, or forbearance of a right, will be sufficient consideration.—12 Wend. Rep. 381. So are mutual

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premises if concurrent in point of time; a subsisting obligation to do a thing, and natural love and affection in a deed, though such a consideration is not valid in executory contracts.—7 Johns. 97; 2 Gill and John. 208.

The consideration must be lawful, not repugnant to sound policy or good morals.—2 McLean's R. 267; 11 Wheat. 258. But if a party fulfill an illegal contract, he cannot recover the money back.—6 Cowen's Rep. 431. This rule does not apply to a case where there is money in the hands of a stakeholder.—11 Johns. 23; 21 Vermont R. 9, 191, 184.

A want or failure of consideration may be pleaded, when, see ante, R. S. vol. 2, p. 44, sec. 81.

Inadequacy of consideration, in general, is not of itself sufficient to avoid a contract; but when coupled with weakness of mind by whatever cause produced, or with pecuniary distress, or circumstances of fraud, it affords a proper subject of relief in equity.—*McCormick* vs. *Malin et al.*, 5 Blackf. 509.

A person being unable to pay all his debts, may sell his goods *bona fide* to another, in consideration that the latter will pay the purchase-money to a part of the vendor's creditors, specifying them, though the preferred creditors have not assented to the sale.—*Anderson* vs. *Smith et al.*, 5 Blackf. 395.

Debt on a sealed note for the payment of money against the maker. Plea, that the note was given for the price of fourteen volumes of a certain medical work sold by the plaintiff to the defendant; that by a false and fraudulent warranty that the "work was an improved system of one Samuel Thompson's system of botanic medicine," the plaintiff induced the defendant to make the purchase; that the work so purchased was not an improved system of said Thompson's system of botanic medicine; that the plaintiff "therein knowingly deceived and defrauded" the defendant; and that said books were of no value to the defendant, by reason of the said work not being an improved system of said Thompson's system of botanic medicine. Held, on general demurrer, that the plea was insufficient.—*Howard et al.* vs. *Cadwalader*, 5 Blackf. 225.

An agreement not to bid against each other, at a sale on execution, is void, as against public policy.—2 McLean's R. 267.

But an association of individuals to buy public lands at a public sale, is not unlawful.—*Ibid.*

The contract of a corporation, unauthorized by, or in violation of, its charter, is void. And so will be a new contract growing out of it, and not founded upon a new consideration.—2 Doug. Mich. Rep. 230.

But a subsequent contract, if unconnected with the illegal act, and for a new consideration, is valid and will be enforced, although it may have grown out of the illegal transaction, and the party to whom the promise was made may have had a knowledge of it.—*Ibid.*

Where two parties claim the same land under conflicting titles, and there is a doubt as to which title is valid, the fact is a sufficient consideration for an agreement to compromise and divide the land; and a specific performance of such agreement will be decreed, where there has been no fraud or unfairness.—2 Doug. Mich. Rep. 344.

And this, though the agreement be by parol, if there has been a part performance to take it out of the statute of frauds.—*Ibid.*

Where the parties to such an agreement had made choice of a third person to make the division, and both attended and took part in it, and one of them had delivered possession to the other of the portion set off to him, and permitted the latter to make repairs upon it, lease it, receive the rents and pro-

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fits, and pay the taxes, it was held, that there had been such part performance.—*Ibid.*

When promises are mutual, and the one the consideration of the other, they are valid.—9 B. Mon. Ky. Rep. 371.

The endowment of a literary institution is not a sufficient consideration to uphold a subscription to a fund designated for that object.—1 Comstock's N. Y. Rep. 561.

And although there is annexed to the subscription a condition that the subscribers are not to be bound unless a given amount shall be raised, no request can be implied therefrom against the subscribers, that the institution shall perform the services and incur the expenses necessary to fill up the subscription.—*Ibid.*

The defendant subscribed $800 to a fund for the payment of the salaries of the officers of Hamilton College, and a condition was annexed that the subscribers were not to be bound unless the aggregate amount of subscriptions and contributions should be $50,000. Held, that there was no consideration for the undertaking, and that no action would lie upon it, although there was evidence tending to show that the whole amount had been subscribed or contributed according to the terms of the condition. —*Ibid.*

A. agrees to sell to B. certain lands, and convey the same to him on a day named, within ten months, and B. pays down the purchase money. A. also agrees that at the expiration of the year, if B. shall desire it and give thirty days' notice, he will pay back the money with interest. This agreement being signed by both parties, it seems, is not void for want of mutuality or consideration, although it contains no express engagement on the part of B. to do any thing.—4 Comstock's N. Y. Rep. 249.

The purchase of the land and the payment by B. of the money, constitute a sufficient consideration to sustain the engagement of A. to convey the land or to repay the money at the election of B.—*Idem.*

The term "agree," in a contract, does not in itself import a consideration. —1 Denio's N. Y. Rep. 226.

It is not necessary that the consideration of a contract in writing should appear upon the face of the writing; it may be proved by parol evidence, or may be inferred from the terms and obvious import of the contract.—21 Vermont Rep. 292.

To constitute a consideration, valid in law, it is not essential that it should be beneficial to both parties to the contract; damage to the promisee is a sufficient consideration.—2 Texas Rep. 467.

The relation existing between a step-father, and a step-son, (a minor) is such that services rendered the step-son are a sufficient consideration to support a contract entered into by the step-father, to pay for the services.— 2 Texas Rep. 452.

II.—*Parol.*

It is an inflexible rule that parol evidence is not admissible to supply or contradict, enlarge or vary the words of a written contract.—12 Johns. 488. Parol evidence is received, where it goes, not to contradict the terms of the writing but to defeat the whole contract, as being fraudulent or illegal; for it then shows that the instrument never had any valid operation.—2 Kent 555. If there is a latent ambiguity, or one not appearing on the face of the instrument, but arising entirely in the application of it, parol evidence to

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explain as to the person or subject-matter, meant to be described, or to rebut a resulting trust, is admissible.—8 Johns. 90.

A. verbally promised B., for a valuable consideration, to board him and his family for a certain time. Afterwards, A. in a bond to C., stipulated, at B.'s suggestion, to board the latter and his family for the same time without charge. Held, that an action would lie on the parol contract.—*Runnion* vs. *Beard*, 6 Blackf. 401.

L., the owner of two taverns in M., sold and conveyed one of them to S., with a verbal agreement, made at the same time, that the other house should not be used as a tavern. L. disregarded the verbal stipulation, and S. brought an action for damages. It is held, that additional terms may be established by parol testimony when such terms amount to a collateral contract.—11 Humph. Tenn. Rep., 308.

A contract by parol, to pay for land, which has been conveyed, is valid, and may be enforced.—9 B. Mon. Ky. Rep. 371.

A verbal agreement, which is executory, between a debtor and his creditor, that the latter shall accept the note of the former, secured by the indorsement of a third person, for two-thirds of his debt, in satisfaction of the whole, to which arrangement the party so endorsing assents, is not obligatory.—1 Spear's S. C. Rep. 368.

Such agreement, unless there be either a benefit to the plaintiff, or a loss to the defendant, so as to constitute a foundation for a new consideration, is *nudum pactum*.—*Ibid.*

III.—*Written.*

Assumpsit, on a written contract to deliver a boat load of corn at New Orleans. The boat sunk before it left the Wabash, and the corn was destroyed. The defendant introduced oral testimony to show that the boat was delivered to the plaintiff at the time the contract was made. The court instructed the jury that the only question was, whether the transfer or delivery of the property was made at the time the contract was completed. Held, that if it was admissible to prove by oral testimony such a delivery, the question was one of fact for the jury, and the defendant could not complain of the instruction.—*French* vs. *Crane*, 1 Carter's Ind. Rep. 494.

Where a contract which is valid, whether written or verbal, is reduced to writing, and is in issue between the parties thereto, oral evidence of its existence cannot be submitted for the written contract, without excuse for the non-production of it.—11 Hump. Tenn. Rep. 549.

Where a written contract stipulates for the performance of an impossibility, it is unnecessary to prove a waiver or abandonment of such contract, in order to enable the plaintiff to recover upon a different verbal contract.—1 R. I. Rep. 205.

The accepting and adopting a written contract by a party who has not put his name to it, binds such party, the same as if he had signed the contract.—21 Vermont Rep. 292.

IV.—*Construction.*

In the construction of contracts, the intention of the parties must govern; words are to be taken in their natural and obvious sense; when the intention is doubtful, the context may be resorted to, to explain ambiguous terms; the whole of the instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual.

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The defendant promised the plaintiff, in consideration of a wagon delivered to him by the plaintiff at the time of the contract, to break up for the plaintiff sixteen acres of new ground on or before a certain day. Held, that the piece of ground to be broken up, if not specified in the contract, might be designated by the plaintiff.—*Ellison* vs. *Dove*, 8 Blackf. 571.

If in such case the plaintiff designate land of such a character as to authorize the defendant's refusal to break it up, that fact should, in a suit for such refusal, be shown by the defendant.—*Ibid.*

In a suit against the defendant for not breaking up the ground, the value of the work, not that of the wagon, is the measure of damages.—*Ibid.*

A. agreed to sell B. a certain tract of land, which B. was to pay for by building a grist-mill for A. The deed for the land was to be executed, as soon as the deed to A. (whose grantor claimed title under an Indian treaty,) should be approved by the President of the United States. Held, that as no time was expressed in the agreement, within which the mill was to be built, it was to be built within a reasonable time. Held, also, that after such time had elapsed, a bill in equity for a title to the land, could not be sustained by B. without an allegation that the mill had been built, or a good cause assigned for the omission.—*Myers* vs. *Cicott et al.*, 5 Blackf. 225.

The appointment of A., by the board of county commissioners of Dearborn county, under the statute of 1835, &c., to superintend the erection of public buildings, &c., was accompanied by a provision that the county should not be liable to A. for any expense, &c. Held, that the county was not liable to A. for services rendered by him under said appointment.—*The Board of Commissioners &c.* vs. *Wood*, 5 Blackf. 182.

If a person undertake to make a steam-engine for two partners, to be of certain dimensions, and of the best quality, and one of the employers afterwards cause the patterns, about to be used for the castings of the engine, to be altered, and the castings be made according to the altered patterns, the undertaker will not be responsible for the sufficiency of the engine.—*Dare et al.* vs. *Spencer et al.*, 5 Blackf. 491.

A contract in restraint of the right of making, selling, and trading fanning-mills south of the Wabash river, within thirty miles of Marion, in Grant county, is not objectionable on account of the extent of space to which it extends, nor because the restriction is indefinite in point of time.—*Bowser et al.* vs. *Bliss et al.*, 7 Blackf. 344.

If two persons exchange horses, with the privilege to one of the parties to return, within a given time, the horse received in exchange, and such party fail, within the time, to return the horse so received, the contract becomes absolute.—*Johnson* vs. *McLane*, 7 Blackf. 501.

And a breach of warranty as to one of the horses, will not, of itself, affect the validity of the exchange.—*Ibid.*

A contract by which two persons by name, describing themselves as trustees of a certain school district, agree that the "trustees" shall pay a teacher a certain sum for his services, and which is executed by those persons in their own names, is binding upon them individually.—*Wiley* vs. *Shank et al.*, 4 Blackf. 420.

If in a contract for the sale of goods, no time be given for payment, the law implies a contract to pay for them on delivery.—*Robinson et al.* vs. *Marney et al.*, 4 Blackf. 329.

A party is bound, in the absence of any misrepresentation of facts, by the legal effect of his contract, and he is presumed to know that legal effect, and to intend it to have it.—*State ex rel. etc.* vs. *Van Pelt*, 1 Carter's Ind. Rep. 304.

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The price of corn at or about the time it should be delivered, and of such a quantity as that agreed to be delivered, is the proper inquiry in ascertaining the damages for failing to deliver according to contract.—9 B. Mon. Ky. Rep. 73.

A contract which is valid in its creation, and a note given upon legal and sufficient consideration, does not become illegal and void, by being used or spoken of for an illegal purpose.—9 B. Mon. Ky. Rep. 193.

A local usage cannot be considered a part of a contract, when it contradicts that contract.—1 R. I. Rep. 147.

A contract referring by its terms to a particular place of performance, is to be construed, and its legal character determined, by the law of the place of performance.—7 B. Monroe's Ky. R. 577.

To authorize a jury to find damages for extra work alleged to be done upon a building, when the original contract was for a building at a fixed price, it should clearly appear that the employer knew that the work was extra work, not embraced in the original undertaking, and that it was assented to by the employer with that knowledge.—11 B. Monroe's Ky. Rep. 17.

A failure to convey, or an offer to convey, is no bar to the recovery on a negotiable note given in consideration of the purchase of land. The contracts are independent.—1 Iowa Rep. 179.

In an action for the non-delivery of corn and fodder, upon an agreement to deliver, *unavoidable accidents only excepted*, it is no excuse that the vendor did not, in consequence of unusual drouth during the cropping season, raise sufficient to supply the quantity agreed to be delivered.—4 Porter's Ala. Rep. 170.

Where upon an entire contract to deliver corn and fodder, the vendor delivers part thereof, the vendee is not bound to receive such part, where there is an understanding that the vendor will not deliver the balance.—*Ibid.*

In order to discharge a defendant from liability, for a non-delivery under such contract, on the ground that the plaintiff refused to receive a part of the goods agreed to be delivered, the jury should be satisfied that the defendant intended to comply fully with the agreement to deliver the whole.—*Ibid.*

In order to render a contract void, for the reason that it was closed on Sunday, it must appear that the party seeking to enforce it had some voluntary agency in consummating the contract on that day.—21 Vermont Rep. 99.

If a contract for the payment of money be fully made and completed on Sunday, and the party subsequently upon another day promise to pay the money, this will ratify the contract and entitle the promisee to sustain an action upon it.—*Ibid.*

In contracts for the sale of lands, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears.—1 Iowa Rep. 490.

A contract by which A. agrees to sell eight hundred bushels of corn, more or less, within a specified time, at a stipulated price, does not give the vendee a property in the corn in question. Something remains to be done by the vendor to ascertain the exact amount sold.—12 Ill. Rep. 467.

Mutuality is essential to the validity of a contract.—1 McLean, 129.

A State law that relieves a debtor from imprisonment, does not impair the obligation of the contract.—1 McLean, 232.

A law which relieves from the contract, cannot be enforced against non-residents of the State.—*Ibid.*

Time may be made the essence of the contract.—1 McLean, 395.

And is never to be wholly disregarded; at law it is always essential.—*Ibid.*

A legislative act, equivalent to a contract which is perfected, requiring nothing further to be done in order to its entire completion, is a contract executed; and

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whatever rights are thereby created, a subsequent legislature cannot impair.—*Ibid*, 12 Connect. Rep. 87.

A legislative act, in the nature of an executory contract, which is supported by a sufficient consideration, creates an obligation which a subsequent legislature cannot impair.—*Ibid.*

But a legislative enactment importing a contract executory, which depends upon the further action of the legislature, or its agents, for its execution, and which is without any consideration in fact or in law, may, before its execution and the existence of any consideration, be repealed; such a contract not imposing any obligation legally capable of being impaired.—*Ibid.*

Where a misapprehension exists between the parties to a contract, with reference to its subject-matter, as where one of them intends to sell a particular thing, and the other intends to buy a different thing, or where the parties to a sale suppose the subject of it to be in existence, when, in fact, it has been destroyed, such misapprehension, if satisfactorily proved, will show that no contract has in fact been made. But the same consequence will not result from a misapprehension of one or both of the parties, with reference to the legal effect of the terms of their contract, unless it be altogether unintelligible.—2 Cush. Rep. 80.

A party who enters into a contract in writing, without any fraud or imposition being practiced upon him, is conclusively presumed to understand and assent to its terms and legal effect.—*Ibid.*

If A. enter into the service of B. upon an agreement to labor for him a year, and leave at the end of six months, A. can maintain no action for the services so rendered; but if B. then promise A. to pay him for the six months' labor, upon the performance of any additional service, however slight, or the doing of some act by A. to his personal inconvenience, though of no value to B., and such service is rendered, or act done, this will so far operate as a waiver of the original contract, that an action may be maintained by A. for the six months' labor.—*Ibid.*

It is a general rule that personal contracts, or those in reference to personal engagements, such as nuptial contracts, and for personal property, are to have the same validity, interpretation, and obligatory force, in every country, which they have in the country where they were made.—8 Peters' U. S. Rep. 361.

Contracts valid in the place where made, are valid everywhere, unless immoral, or contrary to public policy.—Story Con. Law, 203.

So, contracts void by the law of the land where made, are void everywhere. —*Ibid.*

The capacity and incompetency of parties to contract, depend, as a general rule, upon the law of the place where it is made.—*Ibid.*

Remedies upon contracts and their incidents, are regulated and pursued according to the law of the place where the action is instituted.—2 Kent, 461.

V.—*Performance.*

There can be no recovery under a contract for labor performed not pursuant to it.—*State* vs. *Beard et al.*, 1 Carter's Ind. Rep. 460.

If a person agree to perform certain labor, and take his pay in a specific article, and there be no fraud or warranty, he will be bound thereby, although the article be of less value than he supposed.—*Ibid.*

In the case of a special contract, one party cannot, by a part performance only on his part, sue on such contract and recover for the part he has performed.—*Coe* vs. *Smith, ad'r*, 1 Carter's Ind. Rep. 267.

A. for a sufficient consideration, agreed to pay B., at a specified time, a sum of money, to indemnify him against the payment of certain debts, and to give him

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security for the performance of the agreement. Held, that for A.'s non-performance of any of these covenants, he was liable to a suit without a previous demand. Held, also, that a promissory note executed by A. alone, was not the security for the money, contemplated by the agreement.—*Brown* vs. *White*, 3 Blackf. 431.

To an action on a note for the payment of a certain sum, at a certain time and place, in hats, it is a good defense, that the defendant was ready to deliver the hats at the time and place appointed, was always ready, and is still ready, to deliver them at the place on demand.—*Johnson et al.* vs. *Baird*, 3 Blackf. 182.

Where one party to a special entire contract has not complied with its terms, but professing to act under it, has done for, or delivered to, the other party, something of value to him which he has accepted, no action will lie on that contract for the work done or thing delivered; but the party who has been thus benefited by the labor or property of the other, will be responsible on an implied promise, arising from the circumstances, to the extent of the value received by him.—*Lomax* vs. *Bailey*, 7 Blackf. 599.

A person contracted to work for a year at a certain sum per month; but after working three months and ten days, he left his employer and sued him for the work thus done. It was proved that the defendant had manifested a disposition to get the plaintiff to leave him, and had said after the plaintiff was gone, that he was glad of it as the plaintiff was worth nothing. Held, that the action was not sustained.—*De Camp et al.* vs. *Stevens*, 4 Blackf. 24.

The vendor of cattle to be delivered, &c., had them ready, &c.; and the purchaser having failed to attend at the time, came afterwards, paid part of the price, and accepted the cattle, &c. In a suit on the agreement of sale for the residue of the price, the declaration setting out said facts was held good, and pleas that the cattle were not delivered or accepted on the day named in the agreement, were held insufficient.—*Hurst* vs. *Purvis et al.* 5 Blackf. 557.

As a general rule, the personal representative is bound to perform the contract of his testator or intestate, whether named or not, unless something is to be done by the *person*, by which the contract becomes personal.—5 B. Mon. Ky. Rep. 500.

The fact that one who had contracted to deliver cumbrous property on a particular day to one, afterwards contracted to deliver the same property to another, did not authorize the first purchaser to sue for a breach of the contract with him, or dispense with the performance of every act precedent or concurrent which it was his duty to perform to entitle him to his action.—7 B. Mon. Ky. Rep. 272.

Where, on a contract for the sale and purchase of an estate, either party has performed a valuable part of his agreement, and is in no default for the performance of the residue—he is entitled in equity to a specific execution of the other part of the contract.—4 Porter's Ala. Rep. 374.

An offer to deliver, and a refusal to receive, is a sufficient compliance with a promise to deliver specific goods. After such offer and refusal, the parties stand to each other in the relation of bailor and bailee.—2 Texas Rep. 460.

A contract to deliver corn at Louisville in sacks, so soon as it could be brought in boats, is complied with by a delivery at the boats.—9 B. Mon. Ky. Rep. 69.

Where a purchase of land is made to be paid for in carpenters' work, until the work shall be done, there is no pretense of claim for a deed.—3 McLean's Rep. 457.

The possession under such a purchase, without a deed, cannot by lapse of time, ripen into a title.—*Ibid.*

Where, by the terms of a contract for work and labor, the full price is not to

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be paid until the work is completed, and a complete performance becomes impossible by the act of the law, the contractor may recover for the work actually done at the full price agreed on.—4 Comstock's N. Y. Rep. 412.

According to judicial decisions in New York, it is settled, that when the day of the performance of a contract, upon which days of grace are not allowed, falls on Sunday, that day is not to be counted, and the contract may be performed on the next Monday.—3 Cush. Rep. 137.

If by agreement between two persons, one agree to furnish a specified sum of money to carry on a certain business of the parties, and afterwards fail to furnish the money, he is liable to the other at law for such breach of contract. —*Ellison* vs. *Chapman*, 7 Blackf. 224.

It has been held that in a contract to do work, where any money is to be paid before the work is done, that the covenants are independent.—2 Bibb, 15; 4 Litt. 253. But the whole contract should be considered, to ascertain the intention of the parties.—9 Dana, 64. And if one party rely upon the covenant of the other party for indemnity, he will be left to the remedy thereon, but if upon performance, then performance is a precedent condition. —*Ibid*, 594.

A. stipulated to build a house for S., by a specified time, S. to pay $50 in hand, balance when the work was done, &c. Held, that the payment of the $50 was an independent undertaking which might be sued for without avering performance of the work, but as to the part which was to be paid when the house was done, no suit could be maintained without avering performance. —*Ibid.*

When a promissor undertakes to pay a certain number of dollars in specific articles, he must deliver the articles on the day named, or he will be bound to pay the sum stated in money. But if he agree to pay in bank notes, or other evidences of indebtedness, purporting to be, and which can be counted as dollars, he must pay the number of dollars named, of the securities described, in default of which he is responsible only for their real value.—12 Ill. Rep. 184.

The measure of damages, in case of a breach of contract for the sale of a chattel, is the cash value of the article, at the time it should have been delivered.—*Ibid.*

A contract between C. and B., by which C. agrees to saw ninety thousand feet of lumber for B., for five hundred dollars, one half to be paid when half the lumber should be sawed, and the other half when the residue of the lumber was sawed; and in case B. should neglect to furnish logs, so as to keep the mill of C. employed, that C. should be allowed at the rate of fifteen hundred feet per day, upon the contract, for every day his mill should remain idle, is an entire and independent contract, by which C. is compelled to fully perform on his part before he can be entitled to the last half of the compensation.—11 Ill. Rep. 569.

Upon such a contract it was erroneous to instruct the jury that if B. ceased to furnish logs at the mill of C., that C. was thereby excused from a performance on his part of the whole contract, and entitled to recover for what he had sawed at the contract price.—*Ibid.*

C. was bound, under such a contract, to remain prepared to do the sawing, until, at the rate of fifteen hundred feet per day, the residue of the sawing to be done, might be considered as done: and then he would be entitled to the full compensation stipulated.—*Ibid.*

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VI.—*Rescinding.*

See "Fraud."

One party to an executed contract cannot rescind it, without restoring the other party to his original situation.—*Buell* vs. *Tate*, 7 Blackf. 55.

Applications to a court of chancery for the exercise of its jurisdiction to rescind a contract are addressed to the sound discretion of the court; but such discretion must be exercised in conformity with established principles. —*Shaeffer* vs. *Sleade et al.*, 7 Blackf. 178.

A contract will not in general be rescinded when the contracting parties cannot be placed in the identical situation which they occupied when the contract was made. And even when they can be so placed, the contract will not be rescinded, if the application to rescind be not made within a reasonable time.—*Ibid.*

The fact that the obligee of a bond conditioned for the conveyance of real estate, retains possession of the premises, destroys his right to rescind the contract on the ground of the obligor's non-performance on his part.—*Brumfield et al.* vs. *Palmer*, 7 Blackf. 227.

A party having a right to rescind a contract, must exercise the right within a reasonable time.—*Johnson* vs. *McLane*, 7 Blackf. 501.

The holder of a bond conditioned for the conveyance to him of certain land when the price, payable by instalments, shall be paid, cannot rescind the contract on account of the obligor's not being ready to convey the land at the time specified by the contract, if he has since accepted a conveyance. —*Comparet* vs. *Hedges*, 6 Blackf. 416.

A contract cannot be rescinded by one party for the default of the other, unless both can be placed in the same situation in which they stood previously to the contract.—*Chance* vs. *The Board of Commissioners, &c.*, 5 Blackf. 441.

A. being indebted to B., agreed with him in writing to sell him certain boats and cargoes, and B. in consideration thereof, promised that he would forbear to sue, &c., and would constitute A. his agent to sell the property and remit the proceeds, &c.; and by the agreement, if A. failed to remit, &c., B. had a right to annul the contract. At the time of making said agreement, A. executed to B. a bill of sale of the property, and the latter gave the former a power of attorney to sell the same, &c. Held, that the three instruments of writing formed but one contract, and that B.'s right to annul, &c., extended to the whole.—*Fellows et al.* vs. *Kress*, 5 Blackf. 536.

An agreement by parol, to rescind a contract for the purchase of personal property, is binding as a contract of purchase, without delivery in the one case or re-delivery in the other.—3 B. Mon. Ky. Rep. 422.

To rescind a contract for the sale of a chattel, the property must be returned, unless it be valueless to both parties.—3 McLean's Rep. 386.

Where contracts are entered into as auxiliary to a former contract between the same parties, and merely to secure its performance, if the principal contract be set aside, the others must fall with it.—13 Connect. Rep. 1.

When A. sells to B. a tract of land, puts him in possession, takes his notes for the money, and reserves the privilege to affirm or rescind the contract, he cannot bring his writ of right to recover the possession of his lands without surrendering to B. notes, or showing a readiness to place him *in statu quo*.—1 Iowa Rep. 323.

A party wishing to set aside a contract, must show some useful purpose to be thereby accomplished.—1 Iowa Rep. 454.

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A party cannot rescind a contract of sale, and at the same time retain the consideration he has received. If he rescind, he must return the property purchased, in as good condition as when he received it, unless it is entirely worthless.—12 Ill. Rep. 336.

A contract of sale cannot be affirmed as to part, and rescinded as to the residue.—*Ibid.*

Where by a contract, the vendor, for failure of any of the payments, was at liberty to return the money paid, and rescind the contract, it can only be rescinded in that mode.—1 McLean, 54.

CONVEYANCES.

(See R. S., vol. 1. p. 232.)

CRIMINAL CONVERSATION.

The gist of the action is the injury done to the husband in alienating his wife's affections, destroying the comfort he had from her company, and raising children for him to support and provide for.—1 Steph. N. P. 6.

The plaintiff must prove a marriage in fact, proof of reputation and cohabitation not being sufficient. In the case of Nixon vs. Brown, 4 Blackf. 157, it was held, that in an action for *crim. con.* the solemnization of the plaintiff's marriage might be proved by a witness who was present at the ceremony. So, it may be proved by copies of records of marriage, and certificates thereof.—1 Steph. N. P. 11.

Direct and positive proof of the fact of adultery, for obvious reasons, can seldom be obtained, such cases ordinarily being determined by a variety of circumstances, the general rule governing which is, that they should lead the guarded discretion of a reasonable and just man to the conclusion.—*Ibid.*

The confessions of the wife are not in general admissible, yet if made immediately previous to being turned out of doors by her husband they are; and so are her letters found in her desk.—4 C. & P. 621.

General evidence of the good character of the wife is admissible where the defendant has endeavered to impeach it by general evidence.—1 Camp. 460.

The plaintiff may prove several acts of adultery within the times specified, and may also show any indecent familiarities antecedent to the first mentioned day, though he cannot show a criminal connexion previous to that day, except in aggravation.—2 Saund. 5.

Letters written to the wife by the defendant, discourses between her and defendant, letters written by her during an absence from her husband, are admissible. But in the last case, the letters must have been written before the fact charged, and then only to show the state of affection of the husband and wife, her attachment, &c.—2 Stark. 191.

Any circumstances showing the domestic happiness of the plaintiff and his wife, as well as proof of a settlement and provision for children, and the condition of the defendant, such as being a relation, or having been a friend or dependant of the plaintiff, will be received in aggravation of damages.—1 Esp. 22. So will circumstances attending the intercourse of the parties, such as indecent familiarity, elopement, passing as man and wife, and the season and frequency and privacy of their meetings.—*Ibid.* So may evidence be given of anterior acts of adultery for the same purpose.—*Ibid.*

In actions for criminal conversation, the jury in estimating the damages, may regard not only the character and conduct of the husband and wife, to determine what such a husband ought to recover, but the conduct of the defendant to determine what a person who had conducted as he had ought to pay.—4 New Hamp. R. 501.

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The husband may claim compensation from all who have criminal connexion with his wife.—1 Camp. 415.

The action cannot be maintained where the wife has been suffered to live as a prostitute with the privity of her husband, or where he is immediately instrumental to his own dishonor; but if he has been guilty of negligence, merely, that fact goes only in mitigation of damages.—1 Esp. 237.

The defendant may prove in mitigation, that the wife was a woman of notoriously bad character; that she made the first advances; that the plaintiff had turned her out of doors, or otherwise mistreated her; his intolerable ill temper; that she had a bastard before marriage; that she had committed previous acts of adultery; or her wanton manners. So are her letters to the defendant, prior to the time when the criminal acts were proved to have been committed, admissible, if the object be to show that the defendant had been solicited. But evidence of her conduct subsequent to her connexion with the defendant, is not admissible.—1 Esp. N. P. 26. Declarations of the wife, before the criminal intercourse, complaining of ill treatment by her husband, may be admitted where a witness is introduced to prove the harmony of the husband and wife before the adultery.—4 Esp. 237. The negligence of the husband,—such as permitting the defendant to remain in his house after he had received hints of his wife's infidelity,—goes in mitigation.—Bull N. P. 27; 4 N. H. Rep. 501. Evidence that the plaintiff had cohabited with his wife after knowledge of her intercourse with the defendant, or that the plaintiff had had intercourse with other women since his marriage, goes in mitigation of damages.—4 N. Hamp. Rep. 501.

DAMAGES.

(See R. S., vol. 2, p. 205, 214; post, title "Trespass.")

Damages may arise from a breach of contract, or from tort. It is a general rule that the delinquent shall answer for all the injury which results from the immediate and direct breach of his agreement; but not from any remote consequences.—Bouv. Law. Dic. 403.

Where there has been a breach of contract without actual loss, the plaintiff is entitled to a judgment for nominal damages and costs.—7 Humph. Tenn. Rep. 575.

The measure of damages, in an action for a failure to convey land according to covenant, is the value of the land at the time the conveyance was to be made.—2 Scam. Ill. Rep. 344.

In an action by the assignee against the assignor of a promissory note, the measure of damages is the amount paid by the assignee.—2 Scam. Ill. Rep. 562.

Anticipated profits, or speculations in real property, cannot be recovered as damages for a breach of contract.—11 Ohio, 501.

Actual expenditures under the contract may be recovered.—*Ibid.*

The question whether a sum inserted in an agreement to secure the execution of a deed, is a penalty, or liquidated damages, is to be determined by the intent of the parties, as gathered from an examination and construction of the whole instrument.—11 N. Hamp. Rep. 234.

When one contracts to employ another for a certain time, at a specified compensation, and discharges him without cause before the expiration of the time, he is in general bound to pay the full amount of wages for the whole time.—2 Denio's N. Y. Rep. 609.

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But in a suit for the stipulated compensation, the defendant may show in diminution of damages, that after the plaintiff had been dismissed, he engaged in other business.—*Ibid.*

The plaintiff and defendant made an agreement in writing that the plaintiff should convey to the defendant a certain farm, and that in consideration thereof the latter should pay the former the sum of four thousand dollars. The parties also agreed that each should pay to the other, should he neglect to perform his part of the contract, upon performance or tender of performance by the other, the sum of one thousand dollars. Held, that this sum was liquidated damages, and that the plaintiff was entitled to recover it, with interest, of the defendant, upon a neglect by him to perform his part of the contract.—13 N. Hamp. 357.

Where the parties deviate from the terms of a special contract to perform work and labor, in an action for the work done, the contract price will, so far as applicable, generally be the rule of damages.—4 Comstock's N. Y. Rep. 338.

But where the contract is terminated by the employer, against the will of the contractor, the latter is not confined to the contract price of the work done, but may bring his action for a breach of the agreement, and recover as damages the profits he would have made if allowed to complete the work: or he may waive the contract and bring his action on the common count for work and labor generally, and recover what the work done is actually worth. —*Ibid.*

But where the contractor elects to consider the contract as rescinded, and brings his action for work and labor generally, he cannot recover for profits upon the unexecuted part of the work. In such a case the rule of damages is the actual value of what has been done under the contract.—*Ibid.*

Accordingly, where the plaintiffs contracted with the water commissioners of the city of New York to construct a section of the Croton aqueduct, and the corporation stopped the work before its completion, held, that the plaintiffs, under the common count for work, labor, and materials, could recover the actual value of the work done and no more.—*Ibid.*

Where, in a contract for a public work, the employer reserves the right to make alterations in the form or dimensions of the work, the contractor is bound by any alterations made in pursuance of the agreement. Nor can he recover more than the contract price for the work done before the alteration, although it be more expensive and costly than the portion dispensed with by the change in the plan.—*Ibid.*

The proper criterion of damages for failing to deliver property according to contract, is the value of such property at the time and place fixed for its delivery.—9 B. Monroe, 394.

Where a party agreed to convey a certain tract of land for twelve hundred dollars, a part of which was paid down, and was to be received as part of the consideration-money, if such purchase was not completed, or of the damage, if the contract was not performed; and the party covenanted, if he did not conform to his agreement, he would pay five hundred dollars as a forfeiture. Held, that this sum was liquidated damages.—11 N. Hamp. 234.

K. purchased a chattel of C., who previously purchased and got possession of it from S. by fraud. The consideration paid by K. was the discharge of a pre-existing debt against C. and the sale and delivery of an overcoat to C.,

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at the time of the purchase of him. In an action of trover by K. against S., who had re-possessed himself of the chattel, held, that the value of the chattel, and not the value of the overcoat, was the true measure of damages. —13 N. Hamp. 110.

The question whether a sum stipulated to be paid upon the non-performance of a contract, or the happening of a contingency, be a penalty, or liquidated damages, is to be determined upon a construction of the whole contract, and the intention of the parties, as manifested therein.—13 N. Hamp. 275.

In a suit against the defendants for the breach of a contract to pay for wheat in specified quantities of flour and bran, the value of the flour and bran, not that of the wheat, is the measure of damages.—*Lucas* vs. *Heaton*, 1 Carter's Ind. Rep. 264.

An agreement contained a number of stipulations, damages for the breach of some of which would be certain, and of others uncertain, and a mutual covenant if either party should fail, "in any particular to abide by, observe and perform the above written agreement or any article, clause, covenant or promise therein contained, by and on his or their part to be observed, kept, &c., the party so failing, &c., shall pay the other party $10,000 (and no greater or smaller sum,) as, and for the damages occasioned by such failure," &c. Held, that the sum was to be regarded as a penalty, and not as liquidated damages.—*Carpenter* vs. *Lockhart*, 1 Carter's Ind. Rep. 434.

To sustain a suit for damages, on a covenant to convey real estate, occasioned by the non-conveyance, the plaintiff must show a demand of a deed, or a sufficient excuse for a failure to make it, and the covenanter's want of title is a sufficient excuse.—*Ibid.*

The defendant agreed for a valuable consideration, that if he should, after a specified time, practice medicine, &c., within certain limits, the plaintiff should recover of him 1,000 dollars as liquidated damages. The court instructed the jury that if they found the issues of fact for the plaintiff, they must assess the damages to that amount. Held, that the instruction was correct.—*Miller* vs. *Elliott*, 1 Carter's Ind. Rep. 484.

On a covenant to convey real estate, as on a covenant of seizin, the measure of damages is, in the absence of fraud, the purchase-money and interest.—*Blackwell* vs. *The Board of Justices of Lawrence County*, 2 Blackf. 143.

DEMAND.

(See ante, R. S., vol. 2, p. 45 and 55 n.)

When no day of payment is fixed, the debt is due on demand. And if a debtor has tendered the amount due on a note, the payee must demand payment before he can sue.—1 Camp. 181.

Whenever the taking of goods was originally lawful, but are unlawfully detained, a demand is necessary.—2 Saund. 47.

If the original taking is unlawful, no demand is necessary.—*Ibid.*

Where payment is to be made in something besides money, the institution of a suit (which is a legal demand for money only,) is premature, unless preceded by a demand for the payment provided for by the contract, and until such demand be first shown, the defendant is not bound to prove any thing in defense. —1 Iowa, 396.

When the time for the delivery of goods is fixed by the agreement, no demand is necessary before suit.—*Mountjoy* vs. *Adair*, 1 Carter's Ind. Rep. 254.

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No demand is necessary to sustain replevin against a constable who levies on goods in possession of the debtor.—13 Ohio, 30.

A demand at the dwelling house, in the absence of a party who has contracted to deliver specific articles on demand, is sufficient to charge him with the value of such articles.—11 N. Hamp. 256.

A contract payable "in trade," without time or place for payment, is payable on demand, or within a reasonable time thereafter, according to the nature of the thing demanded.—12 Ill. Rep. 72.

The promisee of such a contract should make a demand at the residence or place of business of the promisor, and notify him what kind of trade he is ready to receive, and if he seek to enforce the payment of the contract in money, he should show that he has made a proper demand, or some excuse for not having done so.—*Ibid.*

In the absence of all testimony to show where the contract was made, or where the parties resided, the presumption is that they resided in the county where the action was instituted. But if it be shown that the debtor had no fixed place of residence, or of doing business, or was a non-resident, the rule governing the demand would be different, and in some cases the demand would be wholly dispensed with.—*Ibid.*

The promisee in such a contract undoubtedly has the right to select the kind of trade he would receive, confining himself, however, to such articles as the parties had in view at the time of making the contract, and to the pursuit or business of the promisor.—*Ibid.*

Where the promisor in such a contract was a merchant, the promisee would be confined to such articles as the promisor usually traded in, and the place of demand and delivery would be at the place of business of the promisor. If the promisor was a farmer, the promisee would be confined to farm produce, to be demanded and delivered at the farm of the promisor.—*Ibid.*

No demand is necessary before suit on a contract payable in specific articles when the time and place of payment are fixed in the contract, or when the time of payment is fixed, and the place is left undetermined.—*Frazee* vs. *McChord*, 1 Carter's Ind. Rep. 224.

On such contract a demand before suit is necessary when the place of payment is fixed by the contract, but the time is left undetermined; and when the contract is to pay on demand; but on a contract to pay money, a demand is not necessary.—*Ibid.*

EJECTMENT.

[See ante, R. S., vol. 2, p. 169.]

EVIDENCE.

[See ante, R. S., vol. 2, p. 79 to 106.]

FORMER RECOVERY.

Where an action has been brought for the disturbance of a certain right, and a verdict obtained by the plaintiff under the general issue, and another action is brought by him against the defendant for a subsequent disturbance of the same right to which the general issue is pleaded, the former recovery, though strong evidence to sustain the plaintiff's right in the second suit, is not conclusive

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against the defendant, but may be rebutted by other evidence.—*Heller et al.* vs. *Pine*, 8 Blackf. 175.

If in debt against A., B. and C., on a joint and several promissory note, the plaintiff fail on the ground that the note is invalid as to C., the judgment will be no bar to a subsequent suit against A. on the note.—*Stingley* vs. *Kirkpatrick*, 8 Blackf. 186.

Suit by the assignor of a sealed note against the maker. Held, that a judgment recovered against the maker on the note as garnishee, in an attachment against the payee, might be pleaded in bar of the suit, if the judgment was rendered before the maker had notice of the assignment.—*Covert* vs. *Nelson*, 8 Blackf. 265.

Debt for money lent and other causes of action. Held, that a plea to the whole declaration of a former judgment in a suit by the plaintiff on a promissory note and for work and labor was bad, as he could have given no evidence in the previous suit of money lent.—*Athearn* vs. *Brannan*, 8 Blackf. 440.

The record produced to support a plea of a former judgment, should be of a judgment in a suit in which the cause of action subsequently sued for might have been proved.—*Ibid.*

Suit against A. on a promissory note. Plea, that the note was joint and several, purporting to be executed by the defendant and B. and C.; that the plaintiff had previously sued the defendant and the other makers in debt on the same promises; and that the defendant and B. had recovered in the suit a judgment for costs. Held, that the plea was bad.—*Stingley* vs. *Kirkpatrick*, 7 Blackf. 359.

Debt against A. and B. on a joint note alleged to have been executed by them and their deceased partner C. Plea, *nil debet*. Held, that the jury might consider the suit barred by a former judgment against C. in a suit on the same note.—*Henderson* vs. *Reeves*, 6 Blackf. 101.

A judgment in a suit against two persons on a joint promissory note, rendered against one of them, (the other not having been found,) is a bar to a subsequent suit against both on the same note.—*Taylor* vs. *Claypool*, 5 Blackf. 557.

FRAUD.

[See statute of Frauds, R. S., vol. 1, p. 301; post, title "Warranty."]

Fraud may consist either in the suppression of the truth, or in the misrepresentation of a fact, and vitiates all contracts from the commencement.—3 Chit. Com. Law, 155.

It is a general rule that when a party is not able to protect himself, the courts will interfere. They will, hence, set aside all contracts made by a party while under imprisonment; and, in some instances of extreme necessity and distress, even where there is no duress, if his free agency is entirely overcome by some oppression, fraudulent advantage or imposition.—1 Story on Eq. Jur. 244.

When money or goods are obtained by fraud, the lender or seller may treat the loan or sale as a nullity. He may even claim them in the hands of a sheriff, but not in those of a *bona fide* purchaser.—15 Mass. 75, 156.

Where one party, who is under some special obligation, by confidence reposed or otherwise, fails to communicate facts in his possession, of which the other is ignorant, the presumption of fraud will attach.—Story Eq. Jur. 217.

If one party suffer another to buy an article under a delusion created by his own conduct, it will be deemed fraudulent.—2 Kent, 482.

The seller is bound to disclose latent defects; but those open equally to observation of both parties, he need not.—*Ibid.*

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Where the relation of principal and agent, client and attorney, principal and surety, guardian and ward, trustee and *cestuique trust*, partners and part-owners, exists, the law requires the utmost degree of good faith in transactions between them. And any misrepresentation or concealment of any material fact, or just suspicion of artifice or undue influence, will be fatal to the validity of the contract.—Story Eq. Juris. 224.

If the vendor say or do any thing with an intention to divert the eye, or obscure the observation of the buyer, even in relation to open defects, he will be guilty of fraud.—3 Blacks. Com. 165.

The seller is liable if he fraudulently misrepresent the quality of the thing sold, in some particulars, of which the buyer has not equal means of knowledge with himself; or if he do so in such a manner as to induce the buyer to forbear making inquiries, which, for his own security, he would otherwise make.—2 Kent, 487. So an action will lie against one not interested in the property, for making a false and fraudulent representation to the seller, whereby he sustained damage by trusting the purchaser on the credit of such misrepresentation.—6 Johns. 181.

To render a party liable for representations of character, made by him, it is necessary to prove that they were fraudulently made.—*Hopper, admr.* vs. *Sisk*, 1 Carter's Ind. Rep. 176.

Where a person designedly or knowingly causes a false impression to be entertained by another, who is thereby drawn into a contract injurious to his own rights or interest, it is a case of fraud which will be relieved by courts.—*The State* vs. *Holloway et al.*, 8 Blackf. 45.

A party is not responsible for a misrepresentation of the legal effect of a contract.—*Russell et al.* vs. *Brunham et al.*, 8 Blackf. 277.

The vendor of goods, though defrauded in the sale by the vendee, cannot treat the sale as a nullity, whilst he willingly holds in his hands a valuable consideration which he received for the goods.—*Johnson* vs. *McLane*, 7 Blackf. 501.

A willful and fraudulent representation by the seller of a fire engine, that it was as good as another designated engine, is not fraud in law on the buyer, if the latter was not deceived or misled by the misrepresentation.—*The President &c. of Connersville* vs. *Wadleigh*, 7 Blackf. 102.

Misrepresentations by one contracting party to the other as to the value or quantity of a commodity in market, when correct information on the subject is equally within the power of both parties with equal diligence, do not, in contemplation of law, constitute fraud.—*Foley* vs. *Cowgill*, 5 Blackf. 18.

When a party has been led to enter into a contract by the fraud of the other party, he may, upon discovering the fraud, rescind the contract, and recover whatever he has advanced upon it, provided he does so at the earliest moment after he has knowledge of the fraud, and returns whatever he has himself received upon it.—1 Denio's N. Y. Rep. 69.

The general rule is that the party who would rescind a contract on the ground of fraud, for the purpose of recovering what he has advanced upon it, must restore the other party to the condition in which he stood before the contract was made; but where the party who practised the fraud has entangled and complicated the subject of the contract in such a manner as to render it impossible that he should be restored to his former condition, the party injured, upon restoring, or offering to restore what he has received, and doing whatever is in his power to undo what has been done in the execution of the contract, may rescind it and recover what he has advanced.—*Ibid.*

A contract, however fraudulent, is not a nullity; it is valid as to all the par-

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ties to the fraud, and to all others except those who are injured thereby.—1 Iowa Rep. 467.

Where goods are obtained by a purchase effected through the fraudulent representations of the vendee, the vendor may rescind the contract on the discovery of the fraud, and reclaim the goods.—10 New Hamp. Rep. 477.

If, however, the fraudulent vendee before the contract is rescinded, sell the goods to a bona fide purchaser, for a valuable consideration, without notice, the latter will obtain a good title.—*Ibid.*

A creditor of the fraudulent vendee, whose debt existed at the time of the purchase, cannot prevent the vendor from rescinding the contract, by a mere attachment of the goods, as he cannot thereby obtain a better right in the goods than that of his debtor.—*Ibid.*

But a subsequent creditor, who may be supposed to have given credit upon the apparent ownership of the vendee, may hold the goods if he attach them before the contract is rescinded by the vendor.—*Ibid.*

Where the defrauded party rescinds an *express* contract, he cannot set up an *implied* one, and sue the other party thereon.—1 Doug. Mich. Rep. 330.

Fraud does not render a contract void, but only voidable, at the option of the defrauded party.—1 Doug. Mich. Rep. 330.

If the defrauded party elect to affirm the contract, he is bound by it in all respects.—*Ibid.*

If a vendor having a right to rescind a contract of sale of goods, on account of the fraud of the vendee in making the purchase, bring *indebitatus assumpsit* to recover the price of the goods, he thereby affirms the contract.—*Ibid.*

Where there is an *express* contract none can be *implied*.—*Ibid.*

FRAUDULENT CONVEYANCES.

(See R. S. vol. 1, p. 299, 300-1-2-3, 503.)

GUARANTY.

(See R. S., vol. 1, p. 299, 300.)

This contract is a promise upon a good consideration, to answer for the payment of some debt or the performance of some duty, in case of the failure of another person who is in the first instance, liable to such payment or performance.—3 Kent 120.

The books abound in subtle distinctions concerning the character of the *consideration* and the necessity of its appearing in writing, all of which have been abolished by sec. 2, R. S., vol. 1, p. 300. But our Statute of Frauds still requires that the *agreement* should be in writing, and signed by the party to be charged. When, however, the credit is given not to the buyer, but to the guarantor in the first instance, as where A. tells a merchant that he will be responsible for goods purchased by C. and the merchant charges the goods to A., the promise need not be in writing to bind the guarantor.—3 Johns. Rep. 29; 11 Johns. 221; *Chandler et ux. vs. Davidson*, 6 Blackf. 367.

In the case of a conclusive guarantee—not a mere overture to guaranty—notice of its acceptance is not necessary.—*Jackson et al. vs. Yandes et al.*, 7 Blackf. 526.

In a suit on a guarantee, whether the notice to the defendant of the principal debtor's non-payment was reasonable or not, is a question for the jury.—*Ibid.*

In a suit against the guarantor for the price of goods sold to another upon the defendant's letter of credit, the person to whom the goods were sold is a competent witness for the plaintiff.—*Smith vs. Bainbridge*, 6 Blackf. 12.

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If a letter of credit state, that the writer will guaranty the payment of goods to be afterwards sold to another, or that he will see the goods paid for, or that he will be security for their payment, the promise is only collateral.

In such cases, the person to whom the goods are sold is liable on a general count for goods sold and delivered; but the writer of the letter can only be sued on the special contract.—*Ibid.*

To sustain a suit on such collateral promise, the plaintiff must prove that he had, within a reasonable time after the debt became due, demanded payment of the principal debtor, and given notice of his non-payment to the defendant. But even if such proof were not generally necessary to charge the guarantor, still he would not be liable without it, if the principal debtor was solvent when the debt fell due and afterwards became insolvent.—*Ibid.*

HUSBAND AND WIFE.

(See R. S. Vol. 1, p. 320.)

I.—*Their relative Rights.*

The husband becomes entitled to all the wife's goods and chattels.—2 Kent, 129. But the wife is entitled to her lands and the profits thereof for her separate use.—R. S. vol. 1, p. 321.

On page 504, R. S. vol. 1, it is provided that a general power may be given to married women, to sell or devise lands conveyed or devised to her. But on page 321, R. S., vol. 1, the right to convey, except in conjunction with the husband, is denied the wife. The reasonable conclusion from the statutes would seem to be, that the wife connot convey without joining with her husband, unless a power is granted so to do in the conveyance or devise to her.

The law of descents on p. 250, R. S., vol. 1, radically changes the common law rules in reference to the relative interests of the husband and wife in their lands, upon the decease of either. But the rigor of these rules may, to some extent, be mitigated by a compliance with the provisions of sections 36, 37, 38, 39, 40 or 41, R. S., vol. 2, p. 254, concerning jointures. A married woman may join in a power of attorney with her husband for the conveyance or mortgage of lands.—R. S., vol. 1, p. 237. And her acknowledgment to a conveyance need not be made in any other manner than that of unmarried persons.—R. S., vol. 1, p. 236.

A husband cannot convey land immediately to his wife, but he may convey it to trustees for her use.—*Doe d. Abbott* vs. *Hurd et al.*, 7 Blackf. 510.

The wife is not excepted in the statute of wills, as will be seen by reference to p. 308, R. S., vol. 2. The common law rule is different.—2 Kent, 170.

All debts and choses in action of the wife may be reduced into possession by the husband, when they become his absolutely; or he may release or assign them for a valuable consideration. If not so reduced they survive to the wife.—1 Rand. Va. Rep. 355.

When the husband has deserted his family, the wife may prosecute or defend any action which he might have prosecuted or defended.—R. S., vol. 2, p. 33.

They must prosecute or defend jointly all suits concerning the wife's lands, unless they be separated, in which case the wife may prosecute or defend alone.—R. S., vol. 1, p. 321.

II.—*Liabilities incurred before Marriage.*

The common law rule was, that the husband was liable for all debts and torts of the wife incurred and committed before marriage, and was bound to

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perform her contracts. That rule has undergone a material modification by statute. The husband is only liable now to the extent of the personal property received by him, and the proceeds of the sale of her lands and rents thereof.—R. S., vol. 1, p. 320. For any such liability, judgment may be rendered against the husband and wife jointly to be levied of the wife's lands only.—*Id.* 321.

The wife's personal property is liable for the debts and liabilities of the husband incurred before marriage. But her real estate and the rents thereof are her separate property.—*Id.* 321.

III.—*Liabilities incurred after marriage during coverture.*

The husband is bound to provide his wife with necessaries suitable to her situation, and his condition in life; and if she contract debts due for them during cohabitation, he is obliged to pay them; but for anything beyond necessaries he is not chargeable.—2 Kent, 146. He is bound by her contracts for ordinary purchases from presumed assent on his part; but if he make known his dissent to the seller, the latter cannot recover, except for necessaries; and in such case the burden of proof lies on the seller.—*Ibid.* Where the credit is given to the wife, the husband is not liable. Nor is he liable for money lent to the wife, unless he request it.—7 Taunt. R. 356. If the husband make reasonable provision for his wife during a temporary absence, and the seller has notice thereof, he is not liable.—4 Barn. & Ald. 252. If the husband abandon his wife, or they separate by consent, without any provision for her maintenance, or if he send her away, he is liable for her necessaries, and sends credit to that extent along with her.—2 Kent, 146. But if the wife elope, though it be not with an adulterer, he is not chargeable even for necessaries.—*Ibid.*

All persons supplying necessaries to a married woman living separate from her husband, do it at their peril.—*Ibid.* But if the wife, except in case of adultery, repent and return, and her husband refuse to receive her, he is bound for necessaries furnished her.—11 Johns. Rep. 281.

The husband is liable for the wife's torts and frauds committed during coverture. If committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and must be sued jointly. Where the remedy is only by damages or fine the husband is jointly liable; but if it be by imprisonment on execution, the husband is alone liable to imprisonment.—2 Kent, 149. But this rule has been changed by sec. 503, R. S., vol. 2, p. 149.

When any judgment is rendered against a husband and wife for the tort of the wife, execution thereon must be levied on the wife's lands, if she have any.—R. S., vol. 1, p. 321.

If a husband has either expressly or impliedly made his wife his agent, her declarations in regard to the matters within the scope of her authority, are admissible evidence against him; and whether she is his agent by express or implied authority is a question for the jury.—*Casteel* vs. *Casteel*, 8 Blackf. 240.

If a husband entirely abandon his wife and infant children, leaving them no other means of support than a small farm, on which he had resided, the jury may infer from these facts, that he had authorized his wife to employ, on his responsibility, one of his sons after he became of age, to cultivate the farm for the support of the family.—*Ibid.*

If a husband living separate from his wife, suffer his children to live with the mother, he will be liable for necessaries furnished them at her request.—7 N. H. R. 571.

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INFANTS.

(See post, title "Parent and Child.")

I. — *Liabilities of Infants.*

(See post, "void and voidable acts," p. 571.)

Infants are bound for necessaries or such articles as, under the circumstances in which they are placed, they actually need.—2 Kent, 239. Necessaries include victuals, clothing, medical aid, and good teaching.—Co. Lit. 172.

The tradesman is bound to make due inquiries, and if the infant has been properly supplied by his friends, he will not be liable.—Peake N. P. 239. If he live with his father or guardian, and their care and protection are duly exercised, he cannot bind himself even for necessaries.—9 Johns. Rep. 141.

Necessaries furnished the infant's wife and children, are necessaries for him. —9 Wend. 238. But the real value of the articles furnished, whether necessaries or not, may at all times be inquired into.—*Ibid.*

An infant is liable for money paid at his request to satisfy a debt which he had contracted for necessaries.—1 Denio's R. 460.

An infant is not liable for money borrowed, though expended by him for necessaries, nor for money borrowed to buy necessaries, where it was not so applied; but he is liable where the lender sees that the money is laid out for necessaries, in the same manner as if the necessaries had been directly furnished by the lender.—*Ibid.*

An infant is likewise liable for money paid to procure his liberation from arrest on execution; and, also, on mesne process, when the arrest was for necessaries.—*Ibid.*

A surety on a note given by an infant, who pays the note, may recover the sum paid of an infant.—7 N. H. Rep. 368.

Money, a horse, saddle and bridle, furnished when he was one hundred and eighty miles from home and without either, are not necessaries for which an infant is bound.—1 Bibb, 519.

If an infant do a right act which he was compellable to do, it will bind him. —2 Kent, 242.

Whatever an infant is bound to do by law, the general rule is, that the same will bind him, if he do it without a suit at law.—Co. Lit. 172.

It is a general rule that infants are liable for their torts, such as slander, trespass, &c.—3 Rawle's Rep. 551. They are liable for tortiously converting goods entrusted to them, and for goods delivered to them on special contract for a specific purpose, and for money fraudulently embezzled.—1 Esp. R. 172.

Fraudulent acts will not be protected by infancy. If an infant pay money on his contract, and enjoy the benefit of it, and then avoid it when he comes of age, he cannot recover back the consideration paid.—6 Cowen's Rep. 84. And if he avoid an executed contract when he comes of age, he must restore the consideration which he had received.—1 Johns. Cas. 127. Where he obtained goods upon his false and fraudulent affirmation that he was of age, though he avoided the payment of the price of the goods, on a plea of infancy, the vendor was entitled to reclaim the goods as having never parted with his property in them.—15 Mass. Rep. 359.

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II.— *Void and Voidable Acts.*

When the court can pronounce the contract of an infant to be to his prejudice, it is void; when to his benefit, as for necessaries, it is good; and when it is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant.—2 Kent, 236.

Purchases made by an infant are voidable only.—14 Mass. R. 462.

A deed of bargain and sale executed by an infant for valuable consideration, is voidable, but not void.—*Doe d. Moore et ux.* vs. *Abernathy*, 7 Blackf. 442.

All gifts, grants, &c., of an infant which do not take effect by delivery of his hand, are void; and if made to take effect by delivery of his hand, are voidable.—1 Leach C. C. L. 337.

Though a contract is voidable on the part of an infant, yet on the part of an adult contracting with him, it is binding.—1 Marsh. R. 76.

The contracts of an infant made as an agent, are binding on the principal.—1 Marsh. 438.

A warrant of attorney of an infant to confess judgment, is void.—6 Conn. 393.

An infant will not be bound by a submission to arbitration.—6 Mass. 78.

III.— *How Confirmed or Avoided.*

Those acts of an infant which are voidable only, may be avoided upon his arriving at the age of majority, which is completed on the day preceding the anniversary of his birth.—1 Blacks. Com. 463.

The authorities are not agreed as to what course should be taken by an infant to avoid a contract when he arrives at age. The weight of opinion is that, after a reasonable time has elapsed after majority, he must perform some act in disaffirmance of the contract.

In 11 Serg. & Rawle, 305, it was held that there were three modes of affirming the voidable contracts of infants. 1. By an express ratification. 2. By acts which reasonably imply an affirmance. 3. By the omission to disaffirm within a reasonable time.

An infant may ratify a contract after he becomes of age, even against the consent of the other party.—10 N. H. Rep. 222.

No one but the infant himself, or his legal representatives, can avoid his voidable acts.—13 Mass. Rep. 237.

If the act be voidable only, it is nevertheless binding on the adult whom he dealt with, so long as it remains executory, and is not rescinded by the infant.—10 Serg. & Rawle, 114.

A contract by an infant for the sale of personal property, may be rescinded by him before he arrives at full age.—17 Connect. Rep. 481.

After such contract has been rescinded by the infant, and the title to the property has thus become vested in him, an action cannot be sustained against him for taking such property into his possession.—*Ibid.*

If a bill of exchange be accepted by a person of full age, though drawn during his infancy, he is liable.—4 Camp. 164.

A female infant residing in Pennsylvania, executed there a deed of bargain and sale for land situate in this State. She afterwards married, but whether before or after her majority did not appear, nor did it appear where, after the execution of the deed, she and her husband had resided, nor that her husband had acquiesced in the deed after he knew of it. *Held*, that the lapse of about

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five years after the wife's majority, without any attempt to disaffirm the conveyance, did not, under the circumstances, prevent the husband and wife from disaffirming it.—*Doe d. Moore et ux.* v. *Abernathy*, 7 Blackf. 442.

An action of ejectment for premises conveyed by the lessor while an infant, commenced after his majority, and within a proper period, is a valid avoidance of the conveyance; but the grantee or tenant in possession must be notified of the intention to disaffirm before the commencement of the action.—*Ibid.* See, also, 5 Blackf. 300.

IV.—*Actions by and against.*

(See R. S., vol. 2, p. 29, secs. 11, 12 and 13, and p. 33.)

V.—*Their right to hold property.*

(See post, title "Parent and Child.")

INNKEEPERS.

I.—*Who are Innkeepers and Guests.*

A common inn is a house kept open publicly for the lodging and entertainment of travellers in general, for a reasonable compensation.—2 Kent, 594.

A keeper of a mere coffee house, or private boarding or lodging house, is not an innkeeper in the sense of the law.—1 Bell's Com. 469. So if a person let lodgings only, upon a previous contract with every person who comes, and do not afford entertainment to the public at large indiscriminately, he is not an innkeeper.—*Ibid.*

Where a house of entertainment was kept with lodging and victuals for travellers and others, although it had no stables, and no coaches or wagons stopped there, it was held to be an inn.—3 Barn. & Ald. 283.

The length of time that a man is at an inn makes no difference, if he retain his character as a traveller; but if he come upon a special contract to board, he is not, in the sense of the law, a guest, but is deemed a boarder.—Story Bail. 311.

If a traveller leave his horse at an inn and lodge elsewhere, he will be deemed a guest.—9 Pick. 280. But he will not be considered a guest in such case, if he leave goods, for which the innkeeper receives no compensation.—9 Wend. R. 114.

A neighbor, or friend, who comes to an inn at the request of the innkeeper, is not a guest.—Story Bail. 311.

II.—*Their liabilities.*

In general an innkeeper is responsible for the acts of his domestics, and for thefts, and is bound to take all possible care of the goods and baggage of his guests deposited in his house or intrusted to the care of his family or servants.—2 Kent, 592.

The responsibility of the innkeeper extends to all the goods and chattels, and moneys of his guest, which are placed within the inn; but it does not extend to trespasses committed upon the person of the guest, nor does it extend to loss occasioned by inevitable casualty (see ante, title "common carrier,") or by superior force, as robbery; and it is no excuse for the innkeeper that he was, at

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the time the goods of the guest were lost, sick or insane.—2 Kent, 593. It is not even necessary that the goods be in the special keeping of the innkeeper if they be in the inn, that is sufficient.—*Ibid.*

Where money was stolen out of the saddlebags of a guest which he had delivered to a servant without informing him or his master that there was money in them, the innkeeper was held liable.—1 Haywood's N. C. R. 40.

If an innkeeper refuse either to receive a traveller, or a guest into his house, or to find victuals or lodging upon his tendering him a reasonable price for the same, he is liable for the damages thereby occasioned.—5 T. R. 273. But he is not bound to receive goods on deposit, when the owner is elsewhere.—Mo. 270.

An innkeeper is not bound to receive a guest who conducts himself in a disorderly manner. He may even compel him, under such circumstances, to leave the inn.—Story Bail. 311.

The innkeeper will be excused whenever the loss has occurred through the fault of the guest.—Story Bail, sec. 483.

In recent cases it has been held that innkeepers are liable to the same extent as common carriers, and are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss, not caused by the act of God, or the common enemy, or the neglect or fault of the owner of the property.—9 Pick. 280.

The old doctrine, supported by the weight of authorities, is that an innkeeper is not liable for robbery or burglary by persons from without the inn.—Story Bail. 303.

Case. The facts were as follows: The defendant, who was an inkeeper, had taken the plaintiff's horse to keep a few days before the accident happened which occasioned the suit. The plaintiff rode out the horse one morning, and on returning to the stable, tied him in the stall where he had been previously kept. The next morning, the horse was found dead in the same stall with his head fast in the trough. The trough was made of a hollow beech log, having a bulge in the middle which rendered that part of the trough wider than it was at the top. The horse had got his head fast in the trough by the jaws, and, as the witnesses supposed, had killed himself in the attempt to draw it out. *Held*, that the plaintiff was not entitled to recover.—*Thickstun* vs. *Howard*, 8 Blackf. 535.

The death of a horse whilst in the care of an innkeeper, to whom he had been delivered by a guest, is sufficient to charge the innkeeper with the loss, unless he can exculpate himself by showing due care on his part.—*Hill* vs. *Owen*, 5 Blackf. 323.

III.—*Their lien for charges.*

An innkeeper has a lien upon all articles entrusted to him for expenses thereof, and upon his guest's goods in his care for his charges against him.

If the property entrusted to him be live stock, or is of a perishable nature and will be greatly injured by delay, the innkeeper may, after the expiration of thirty days from the time his charges are due, proceed to sell such property, after giving ten days' notice thereof.—R. S., vol. 2, p. 240–1. When the property is not of a perishable nature, it cannot be sold until six months after the charges have accrued.—*Ibid.*

Where several horses are kept, the lien is only on each horse for its keeping.

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Nor can the horse be detained for the keeping of the owner.—1 Bulst. 207, 217. And if the horse is once delivered to the owner the lien is released.—*Ibid.*

Story, in his treatise on Bail, p. 311, contends that the innkeeper's lien for charges, extends to all the goods and chattels of the guest in his custody, whether the expense was incurred on the particular goods or not.

INSANITY.

I.—*In reference to Contracts.*

(See ante, R. S., vol. 2, p. 550, title "Contracts.")

II.—*In reference to Crimes.*

It is a rule of law, universally recognized in all civilized nations, that whenever a party charged with a crime is so far deranged in mind as to be unable, at the time he did the act, to discriminate between right and wrong, he is not responsible.

There are three kinds of insanity which excuse crime: 1. *Idiocy.* 2. *Adventitious insanity*, and, 3. *Voluntary or acquired insanity.*—Arch. Cr. Pl. 12.

1. An idiot never has any sane or lucid intervals.

2. *Adventitious* insanity may be *partial*, as monomania, where the person is insane upon some subjects and sane upon others, or *total*. So it may be *permanent*, when it is usually called madness; or *temporary*, where there are lucid intervals, when it is called *lunacy.*—*Ibid.*

3. *Voluntary insanity* may be produced by drunkenness or indulgence in violent passions.—4 Blacks. Com. 18.

The distinction between that degree of insanity which does, and that which does not, excuse the commission of crime is involved in much perplexity. In one instance it was said, that where the person has as great an understanding as an ordinary child of fourteen, he might be guilty of crime.—1 Hale P. C. 30. Mr. Russell says, that, "idle and frantic humors, actions occasionally unaccountable and extraordinary, mere dejection of spirits, or even such insanity as will sustain a commission of lunacy, will not be sufficient to exempt a person from punishment who has committed a criminal act. And it seems that though there be a total permanent want of reason, or if there be a temporary want of it when the offense was committed, the prisoner will be entitled to an acquittal; yet if there be a partial degree of reason, a competent use of it, sufficient to have restrained those passions which produced the crime; if there be thought and design; a faculty to distinguish the nature of actions; to discern the difference between moral good and evil; then upon the fact of the offense being proved, the judgment of the law must take place."—1 Russ. on Cr. 12.

As to insanity produced by drunkenness, see ante, R. S., vol. 2, p. 391. If the insanity is habitual and fixed, though caused by frequent intoxication, it excuses crime. But if the crime be committed whilst the party is in a state of intoxication, merely, he is not thereby excused.—Am. Jur. vol. 3, p. 6.—See ante, R. S., vol. 2., p. 333.

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MALICIOUS PROSECUTION.

(See post, "Trespass by Officers.")

(For the criminal prosecution, See ante. R. S., vol. 2, p. 432.)

A malicious prosecution imports a wanton prosecution or arrest, made without cause, by regular process and proceeding, which the facts did not warrant, as appears by the result. To entitle the plaintiff to recover, it must be established that the defendant had no probable cause or reasonable ground, for instituting the original prosecution or action.—1 Saund. 228. Probable cause will be presumed till the contrary appear, and the plaintiff is bound to show total absence of probable cause, whether the original proceedings were civil or criminal.—5 Taunt. 580.

In an action for malicious prosecution, malice is a question of fact for the jury; and in such action, the jury may infer malice from the want of probable cause, but are not bound to do so.—*Newell* vs. *Downs*, 8 Blackf. 523.

A. cannot sustain a suit against B., for procuring another to sue him, A., unless the suit against A. was without cause.—*Grove* vs. *Brandenburgh*, 7 Blackf. 234.

If in an action for maliciously indicting the plaintiff, &c, it appear that a *nolle prosequi* to the indictment had been entered, and a judgment thereupon rendered that the defendant "go hence, thereof acquit, without day," the acquittal is sufficient to warrant the suit.—*Chapman* vs. *Woods*, 6 Blackf. 504.

A. made an affidavit before a justice of the peace, stating that he had lost certain goods, which he believed were concealed in the possession of B. The justice thereupon issued a warrant against B. for larceny. B. was arrested on the warrant and afterwards acquitted. *Held*, that A.'s affidavit contained no criminal charge, and that he was not, therefore, liable to B. in an action for a malicious prosecution.—*McNeely* vs. *Driskill*, 2 Blackf. 259.

Case by A. against B. Counts in malicious prosecution for perjury, and in slander for words charging the same crime. Plea, that A. had committed the perjury alleged. *Held*, that B. might prove, on the trial, that A. had given advice as to the best mode of commencing the suit against B., in support of which A. was said to have afterwards committed perjury; and might also prove that A. had received information, before he gave his evidence, tending to show the want of any foundation for the suit against B.—*Scott* vs. *Mortsinger*, 2 Blackf. 454.

There are three sorts of actions, any of which would be sufficient ground to support an action for a malicious prosecution: 1. the damage to a man's fame, as if the matter whereof he be accused is scandalous; 2. when a man is put in danger to lose his life, limb, or liberty; 3. damage to a man's property, as when he is forced to expend money in necessary charges to acquit himself of the crime of which he is accused.—3 Stephen's N. P. 2276.

In an action for a malicious prosecution, it is no answer that the defendant was encouraged in what he did by the opinion of counsel, if the statement of facts made to the counsel were incorrect, or the opinion ill founded.—5 Taunt. 277.

An action for a malicious prosecution, lies where a bill of indictment has been preferred and returned *ignoramus;* preferred *coram non judice;* and when the plaintiff has been acquitted on a defect in the indictment.—3 Stephen's N. P. 2276.

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If a party be indicted for a felony, though he be acquitted without calling witnesses, he cannot maintain an action for a malicious prosecution, if his acquittal was the result of deliberation, or that the evidence was sufficient to cause the jury to pause.—3 Esp. N. P. C. 7.

Where the prosecutor has abandoned the prosecution without giving any evidence, and it is proved that the defendant was actuated by malicious motives, though some evidence must still be given of a want of probable cause, slight evidence will be sufficient.—1 Camp. 203.

Evidence as to the conduct of the defendant in the course of the transaction, his declarations on the subject, and any forwardness and activity in exposing the plaintiff by a publication of the proceedings, can be adduced to prove malice.—3 Stephen's N. P. 2284.

In the first instance, the plaintiff must adduce some positive evidence arising out of the circumstances of the prosecution, to show that it was groundless; it is insufficient to prove a mere acquittal, or even to prove any neglect or omission on the part of the defendant to make good his charge.—9 East, 361.

If the defendant, in an action for malicious prosecution, would take shelter under the "advice of counsel," he must be prepared to show that he communicated to such counsel all the facts bearing upon the guilt or innocence of the accused, of which he had knowledge, or by reasonable diligence could have ascertained.—20 Ohio R. 119.

A reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense of which he is charged, is a good definition of the term probable cause.—20 Ohio R. 119.

Proof that the examining magistrate bound the accused over to court, is not conclusive evidence of probable cause.—20 Ohio R. 119.

An action will lie for maliciously suing out an attachment, though the indebtedness was just.—20 Ohio R, 119.

In an action for malicious prosecution, where damages are recovered for injury to fame, &c., no action of slander will lie for the same cause.—4 Comst. N. Y. Rep. 578.

An action will not lie for maliciously causing the plaintiff to be arrested on a criminal charge before a magistrate, unless the proceeding complained of be so far ended that nothing more can be done by the prosecuter without commencing anew.—6 Hill's R. 344.

In order to maintain the action, however, it is not necessary to show an acquittal which will bar a second prosecution for the same offense; nor is it essentially necessary that any judicial decision upon the merits should appear to have been made.—*Ibid.*

It is not always necessary that a party should be arrested, or that process should be served upon him, in order to the maintenance of an action for malicious prosecution.—9 N. H. Rep. 9.

MARRIAGE CONTRACT, BREACH OF.

I.—*Generally.*

For a breach of marriage contract an action lies against the defaulting party. Infancy is a good defense to the action, but an infant may maintain the action. It is not necessary that an express promise should be proven; but a promise

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may be inferred from circumstances usually accompanying such a relation between the parties.—16 Mass. Rep. 1.

The declarations of the plaintiff that she had promised to marry the defendant, made long before suit brought, are good evidence for the plaintiff to show the mutuality of the contract.—1 Halst. N. J. Rep. 384.

In such an action a witness may be asked his opinion, whether living with the plaintiff, and from an attentive observation of her deportment, etc., he is not of opinion that the plaintiff was sincerely attached to the defendant.—4 Cowen's R. 355.

The defendant cannot show by general reputation, that after the promise another had supplanted him in the affections of the plaintiff.—7 Cowen's Rep. 22.

If the woman was of bad character at the time of the contract, and that was unknown to the defendant, the verdict ought to be in his favor. And if the plaintiff after the promise, had prostituted her person to any person, other than the defendant, she thereby discharged the defendant.—3 Mass. Rep. 189.

Attentions, merely, on the part of an unmarried man to an unmarried woman, do not constitute a marriage contract; and the mere fact that they are long continued, or that the neighbors suppose such a contract must exist, adds nothing to their intrinsic weight. But evidence of mere attentions is always admissible upon trials for breach of contract of marriage, and its weight and effect are to be determined by the jury.—21 Vermont R. 368.

When the declaration alleged an unconditional promise of marriage, but the evidence was that the defendant promised the plaintiff to marry her if he ever married, and that he afterwards married another person; *held*, not sufficient to sustain a verdict for the plaintiff.—6 Hill's N. Y. R. 444.

Where a promise to marry generally without any time fixed, but the defendant broke off all intimacy with the plaintiff, and on request did not explain why, it was held that it might be left to the jury to infer a refusal.—7 Cow. 22.

A jury may infer mutual promises of marriage from the defendant's visits to the plaintiff as a suitor, and his declarations that he had promised to marry the plaintiff.—6 Cow. 254.

Unchastity or immorality in the plaintiff may be given in evidence by the defendant.—4 Cow. 355.

After a defendant has once broken a promise of marriage, his offer to renew it, is no defense to an action for the breach.—6 Cow. 254.

II.—*Aggravation of Damages.*

In an action for breach of promise of marriage, if the defendant give notice that he will prove that the plaintiff has been guilty of fornication, but fail entirely to show it on the trial, the jury may consider this in aggravation of damages.—6 Cow. 254.

In an action to recover damages for the breach of a contract of marriage, the plaintiff, after proof of an express promise of marriage, in order to enhance the damages, read in evidence a letter addressed to her by the defendant, after the action was brought containing many gross and indecent expressions, and accusing her of unchasteness, &c.—*Held*, that the evidence was inadmissible.—14 N. H. R. 302.

In an action founded upon a promise of marriage, the plaintiff may show circumstances of contumely and aggravation attending the breach of the promise,

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to enhance the damages; and for this purpose may prove the declarations of the defendant, even if they contain an actionable slander.—10 N. H. Rep. 327.

In an action for a breach of promise of marriage, the plaintiff may introduce evidence of seduction, in aggravation of damages.—*Whalen* vs. *Layman*, 2 Blackf. 194; 3 Mass. 73; 3 Mass. 188.

III.—*Mitigation of Damages.*

In an action for a breach of promise of marriage the defendant may show in mitigation of damages, that the woman's conduct was indelicate before and after the promise.—3 Mass. R. 189.

And the defendant may also show that after he had broken off all intimacy with the plaintiff, she was guilty of indecent and lascivious familiarity with another man.—7 Cowen's N. Y. R. 22.

When after a promise of marriage, a woman is seduced, in consequence of which she acquires a bad character, the defendant shall not be permitted to avail himself of this character in mitigation of damages.—3 Mass. R. 192.

MASTER AND SERVANT.

I.—*Generally.*

There are recognized in this country three kinds of servants; 1. *Slaves*; 2. *Hired servants*; 3. *Apprentices*. Decisions will be collected mainly in reference to hired servants, apprentices being provided for by statute, R. S., vol. 1, p. 363, and domestic slavery not being local to this state.

The relation of master and hired servant rests altogether upon contract. Such a servant may be dismissed, before the expiration of the term, either for immoral conduct, wilful disobedience, or habitual neglect.—2 Kent, 259.

A servant may justify a battery in defense of his master, but it is doubtful if the master can justify for a defense of his servant.—*Ibid*, 261.

The master can have no action against the servant for quitting his service, if he exacted duties that were not lawful.—8 Conn. R. 14.

II.—*Liability of Master for servant's contracts.*

(See R. S., vol. 1, p. 363.)

A contract made by a servant acting under the implied or express authority of the master, is binding on the latter.—3 Stephen's N. P. 2335.

If the master employ his servant to buy things on credit, he will be liable to whatever extent the servant shall pledge his credit.—*Ibid.*

Where a party dealt with a tradesman on credit, notice to the tradesman's servant that, in future, he intended to pay ready money, is insufficient; the notice must be given to the tradesman himself.—3 Esp. N. P. 85.

If a servant employ a tradesman to do any work, who has not been employed before by his master, and the tradesman do the work without communication with the master, though the thing to which the work was done was the property of the master, he will not be liable; nor can the tradesman retain the property as a lien.—4 Esp. N. P. 174.

If the master of a family be in the habit of paying ready money for articles furnished in certain quantities to his family, and if the tradesman suffer other goods of the same sort to be delivered without informing the master, or satisfy-

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ing himself that they were for his use, when in fact they were not, the master will not be liable.—3 Esp. N. P. 214.

The better opinion is, that the master is not bound to provide a servant with medical attendance and medicines during sickness.—2 Kent, 261.

When the servant acts contrary to his duty, and the master adopts his acts, the master will be liable.—12 Johns. 300.

III.—*Liability of Master for servant's torts.*

A master is responsible for the tortious acts of his servant, when committed in the execution of his orders.—3 Stephen's N. P. 2337.

But it is competent in all cases for the plaintiff to bring his action, either against the person from whom the authority flowed, or against the person by whom the injury was committed.—3 Camp. 403.

If an injury happen through the misconduct of a servant in driving his master's carriage, the master will be liable, though the servant be going out of the way.—3 Stephen's N. P. 2338.

If a master command his servant to do an illegal act, the servant as well as the master, will be liable to the party injured.—3 Lev. 352.

A master is liable when his servant causes injury by doing a lawful act negligently, but not when he wilfully does an illegal one.—6 T. R. 659.

A master will not be liable if the servant use the carriage for his own purpose, and without his master's consent, because the master is only liable when the servant is acting in the course of his employment.—3 Stephen's N. P. 2340.

If a servant employ another servant to do his business, and in doing it the servant so employed is guilty of an injury, the master is liable.—2 Kent, 260.

The general rule is, that a master is liable in a civil suit for the negligence or unskilfulness of his servant, when he is acting in the employment of his master; but that he is not subject to be punished by indictment for the offenses of his servant, unless they were committed by his command, or with his assent.—*Hipp* vs. *The State*, 8 Blackf. 149.

A corporation aggregate is liable for the negligence and unskilfulness of its servants.—12 Mass. 252.

IV.—*Servant's Wages.*

The servant is entitled to whatever the contract provides, for his wages, if he comply with the terms thereof. If there be no contract as to the amount, he will be entitled to so much as his services are reasonably worth.

But if the servant hire for a definite term, leave the service before the end of it, without reasonable cause, or is dismissed for such misconduct as justifies it, he loses his right to wages for the period he has served.—2 Kent, 258. See, also, 1 Blackf. 122.

A person who undertakes to perform a job of work by special contract, must perform his contract before he is entitled to his pay.—5 Johns. 85. And even if he also furnish the materials he cannot recover if the same are of no value to the defendants.—14 Mass. 282.

In case the servant is dismissed without cause before the end of the term, he may sue for before the end of the term, and recover, for the whole term.—4 C. & P. 208; 7 Am. Com. Law, 41, n.

If a hired servant contract to work a year, he can recover no pay unless he fulfill his contract, except he has a reasonable excuse.—19 Johns. 337.

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When a special contract is made to perform work, and furnish materials, and the work is done, and the materials are furnished, but not according to the stipulations in the contract, if the work and materials are of some value and benefit to the other contracting party, the plaintiff may recover on a *quantum meruit* for the work, and a *quantum valebat* for the materials.—7 Pick. 181.

And when the evidence is sufficient for the plaintiff to recover on the general count, he may recover, although the special contract declared on is not performed.—10 Johns. 36. But this decision is modified in 13 Johns. 94. See also, 5 Mass. 391; 7 Johns. 132.

When a party declares on a special agreement, seeking to recover thereon, but fails altogether, he may recover on a general count, if the case be such, that supposing there had been no special contract, he might still have recovered.—7 Johns. 132.

So far as the forms of action are concerned, the difficulty resulting from the conflicting decisions on this point are removed by the new civil code.—See ante, R. S., vol. 2, p. 27.

NOTES, PROMISSORY.

(See R. S., vol. 1, p. 379.)

PARENT AND CHILD.

I.—*Rights and duties of the Parent.*

It is the duty of parents to maintain and educate their children during infancy, and make suitable provision for them after they arrive at the age of majority.—2 Kent, 189. See page 363, R. S., vol. 1.

The husband is not liable for the expense of the maintenance of the child of the wife by a former husband. If, however, he take the wife's child into his own house, he is then responsible for its education and maintenance as long as it lives with him.—4 East, 82.

A father is not bound by the contract of his son even for necessaries, unless an actual authority be proved, or the circumstances be sufficient to imply one.—2 Kent, 191.

If the father suffer the children to remain abroad with their mother, or if he force them from home by severe usage, he is liable for their necessaries.—3 Day's Rep. 37.

The father is entitled to the custody of his minor children, and to the value of their services and labor.—Reeve's Dom. Rel. 270. This right is perfect while the child is under fourteen years of age, and continues until the age of majority, unless under such circumstances as are pointed out, post, page 581, R. S., vol. 2, title, "*Rights and duties of the child.*"

When the father has but little property, he is entitled to an allowance from the children's towards their support.—4 Mass. Rep. 97.

If a man live away from his family, and provide for their support in a particular manner, he is not liable otherwise.—11 Wend. 33.

When a child voluntarily leaves a parent, he carries no credit with him.—16 Mass. R. 28.

If a father neglect to furnish necessaries for his minor children, the law will imply a promise by him to pay any person who may furnish them.—8 N. H. Rep. 350. But in such case there must be palpable neglect.—*Ibid.*

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The custody of minors is given to their parents for their maintenance, protection and education; and if a parent, overlooking all these objects, should, to answer his own mercenary views, bind his child as an apprentice, upon terms evidently injurious to his interests, it would be difficult to enforce such a contract.—1 Mason C. C. R. 71.

Parents may transfer their right, or authorize those who employ their children to pay them their own earnings; and in such case, the payment will be a discharge against the parents.—12 Mass. Rep. 375.

Though the parents are entitled to the possession of their minor children, yet that right may be forfeited by ill-treatment, improvidence, etc.—2 T. R. 26. (See ante, R. S., vol. 2, p. 194; R. S., vol. 1. p. 363.)

II.—*Rights and duties of the Child.*

Children owe obedience and assistance to their parents during their minority. —2 Kent, 192.

When a minor makes a contract for his services on his own account, his father not objecting, this will be considered an implied consent on the part of the father, for the child to have his earnings, and the father consequently has no claims thereto.—2 Pick. Mass. R. 201.

When the father had, by indenture of apprenticeship, relinquished all claim to the earnings of the son, till his age of twenty-one, the minor alone was held entitled to the earnings; and it was also held, that the creditors of the father could not attach them by a process of foreign attachment.—5 Wend. 206.

A mother, who is executrix, may charge her minor children for their board, and credit them their services.—3 Bibbs's R. 456.

A child and heir to his father, may sue for property in possession of his step father.—7 Wend. 354.

If a son continue to labor for a parent with a view to a recompense by will, he cannot sue for it.—3 Rawle, 243.

A promise by a son to support a parent on receiving a consideration therefor, and for necessaries furnished by a father, will render him liable.—5 Wend. 558; 7 Conn. R. 57.

A father may claim the services of his children, whilst they are under lawful age, and are supported by him. But should he, at any time, relinquish, the profits of his children's labor then they belong to themselves, and cannot be seized by the creditors of the father.—*Jennisen et al.* vs. *Graves et al.*, 2 Blackf. 440.

If a father voluntarily send his minor children away from home, to obtain a maintenance and support, in any manner they can, this is an implied consent to any contract for that purpose into which they may enter, and a waiver of his parental rights.—1 Mason C. C. R. 71.

An infant whose father is dead, and whose mother is again married, is entitled to his own earnings, and may maintain an action to recover them.—4 Mass R. 675.

Notwithstanding minor children have property of their own, the father is bound to support them, if he be of sufficient ability; but it is otherwise of the mother.—2 Mass. R. 4150. But if the father be not of sufficient ability, he will be entitled to a sufficient compensation for their support, out of their own property.—*Ibid.*

The marriage of a minor son removes him from the control of the father, and

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gives him a right to apply his earnings to the support of his family.—16 Mass. 204.

(For Guardian and Ward, see ante p. 321, R. S, vol. 2.)

(For Illegitimate children, see ante, R. S., vol. 2, p. 485.)

PARTNERS.

I.— *Who are.*

The act of 1843 (R. S., 1843, p. 583), providing for limited partnerships is repealed.

Partners are either ostensible, dormant or nominal. An actual ostensible partner not only participates in the profits and contributes to the losses, but appears and exhibits himself to the world in connection with the partnership as a component member thereof; and is answerable for the debts and engagements of the partnership.—6 Serg. & Rawle, 259; 16 Johns. 40.

A dormant partner participates in the profits of the trade. His name is suppressed and his interest is not therefore apparent. He is, however, liable as a partner.—16 Johns. 40.

A nominal partner has not any actual interest in the partnership, so far as the trade or its profits are concerned. He merely permits his name to be used in the concern. Yet he is liable as a partner.—6 Serg. & R. 338.

If one person advance funds, and another furnish his personal services, or skill, it is a partnership.—16 Johns. 34.

Surviving partners and the representatives of deceased partners are not partners, but tenants in common.—2 Vesey, 297.

To constitute a partnership, the parties must not only be concerned jointly in the purchase, but also in the future sales, profits, and losses.—3 Kent, 25.

If several persons, who had never met and contracted together as partners, agree to purchase goods in the name of one of them only, and to take *aliquot* shares of the purchase, and employ a common agent for the purpose, they do not, by that act, become partners or answerable to the seller in that character, provided they are not jointly concerned in the resale of their shares, and have not permitted the agent to hold them out as jointly answerable with himself.—9 Johns. 470.

Allowing a clerk, or agent, a portion of the profits of sales as a compensation for labor, does not render him a partner.—3 Kent, 33.

The existence of a partnership cannot be proved by reputation.—*Earl* vs. *Hurd*, 5 Blackf. 246.

II.— *Their Rights and Liabilities.*

(See ante, p. 543, R. S., vol. 2.)

Each individual member of a firm is answerable for the whole amount of the debts of the concern, without reference to the proportion of his interest, or to the nature of the stipulation between him and his associates.—3 Kent, 32.

If one party borrowed money in his individual name, a dormant partner is equally liable, if the borrower represented it to be for the use of the partnership, though without such representation, the creditor must prove that the money went to the partnership use.—9 Pick. 272.

Nor can a partner exonerate himself from personal responsibility for the ex-

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isting engagements of the company, by assigning or selling out his interest in the concern.—2 Carr. & Payne, 401.

When a person joins a partnership, he does not, without a special promise, assume the previous debts of the firm, nor is he bound by them.—4 Taunt. Rep. 582.

If, however, goods are purchased in pursuance of a previous engagement between two or more persons, that one of them should purchase the goods on joint account, in a foreign adventure, they are all answerable to the seller for the price, as partners, even though their names were not announced to the seller.—12 East, 421.

Partners are joint tenants of their stock in trade, without the right of survivorship. But no partner has an exclusive right to any part of the joint stock, until a balance of accounts is struck, and the amount of his interest is ascertained; and his interest is his share in the surplus, according to the partnership agreement, after the firm accounts are settled, and all just claims satisfied.—6 Mass. Rep. 242.

The act of one partner is the act of all. His act, though on his private account, and contrary to the private arrangement among themselves, will bind all the parties, if made without knowledge in the other party of the arrangement, and in a matter, which, according to the usual course of dealing, has reference to business transacted by the firm.—3 Kent, 40.

In all contracts concerning negotiable paper, the act of one partner, unless done without the appearance of being a partnership transaction, binds the firm. —1 Camp. N. P. 384.

If from the subject matter of the contract, or the course of dealing of the partnership, the creditor was chargeable with constructive knowledge that the transaction was on the private account of the partner, the partnership is not liable.—5 Conn. 574.

Each partner, in ordinary cases, and in the absence of fraud on the part of the purchaser, has the complete disposition of the whole partnership interests, and is considered to be the authorized agent of the firm.—12 Mass. 54.

The weight of authority is in favor of the power of a majority of the firm, acting in good faith, to bind a minority in the ordinary transactions of the partnership, when all have been consulted.—3 Kent, 45.

A partner may pledge the partnership effects, in a case free from collusion, if done in the usual mode of dealing, and it has no relation to the trade in which the partners are engaged, and when the pawnee had no knowledge that the property belonged to the firm.—*Ibid.*

A partner cannot bind his co-partner by a guaranty, or letter of credit, without special or implied authority, unless the guaranty be afterwards adopted by the firm.—2 Penn. Rep. 177. Nor can one partner bind the firm by deed, unless specially authorized so to do by an instrument under seal.—7 Tenn. R. 207. An absent partner, however, may be bound by a deed provided there be a previous parol authority, subsequent to the adoption of the act.—11 Pick. 405. Nor can one partner bind the firm by a submission to arbitration.—1 Peters U. S. R. 221.

Assumpsit in the circuit court on appeal from the judgment of the president of the select council of the town of Lawrenceburgh. The suit having been commenced against the defendants in their christian names and surnames, it was held that the statement of demand might be against them in the name of the firm.—*Percival et al.* vs. *Groff*, 8 Blackf. 233.

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If one of two partners, in the presence of the other and with his consent, subscribe the names of both to a note and put a seal to it, it is the deed of both.—*Henderson* vs. *Barbee*, 6 Blackf. 26.

If a creditor of one of several partners take a bill or note from his debtor in the name of the firm for his debt, without the knowledge of the other partners, he cannot sue the firm on such bill or note.—*Hickman* vs. *Reinking*, 6 Blackf. 387.

The defendant's acknowledgment of the partnership of the plaintiffs, is sufficient evidence of such partnership.—*Bisel et al.* vs. *Hobbs et al.*, 6 Blackf. 479.

In a suit against partners in a distillery and in the purchase of corn, the plaintiff may give in evidence the receipt of one of the defendants, acknowledging the delivery of a certain quantity of corn to him by the plaintiff.—*Ibid.*

If goods be purchased by a partner for the use of the firm, the seller may sue the partners for the price, though he did not know, at the time of the sale, of the existence of the firm.—*Ibid.*

The doctrine, that the separate debt of one partner should not be paid out of the partnership estate, until all the debts of the firm are discharged, is correct; but it does not apply until the partners cease to have a legal right to dispose of their property as they please. It is applicable only, when the principles of equity are brought to interfere in the distribution of the partnership property among the creditors.—*M'Donald et al.* vs. *Beach et al.*, 2 Blackf. 55.

Those equitable principles operate on the property remaining in the possession of the partners, and embrace all that has been fraudulently disposed of; but they do not extend to such as has been previously transferred by the firm in good faith.—*Ibid.*

Although one partner cannot bind his co-partner by deed, yet a deed executed by one for himself and partner, in the other's presence and by his authority, is the deed of both.—*Modisett* vs. *Lindley et al.*, 2 Blackf. 119.

Payment of a debt to one partner of a firm is good against the other partners; and a release by one partner to a debtor of the firm is obligatory on the others.—*Yandes et al.* vs. *Lefavour et al.*, 2 Blackf. 371.

III.—*Dissolution.*

If a partnership be formed for a single purpose, or for a definite period, it expires when that purpose is accomplished, or that period elapses.—16 Johns. 491.

A partnership may be dissolved by the voluntary act of the parties, by the death, insanity, or bankruptcy of either, and by judicial decree, or by such a change in the condition of one of the parties as disables him from performing his part of the duty, and by operation of law, as by war between the governments to which the partners respectively belong.—*Ibid.*

In a partnership without any definite period, either partner may withdraw at pleasure, if he act in good faith in so doing.—16 Vesey, 49. So the marriage of a *feme sole* dissolves a partnership of which she is a member.—4 Russ. 260.

In case of the death of one partner, his representatives have a right to have the partnership effects applied to the payment of the firm debts, and may enforce this right by injunction, &c.—3 Kent, 57.

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When the business for which a partnership was created is found to be impracticable, and the property invested liable to be wasted and lost, the scheme visionary and founded upon erroneous principles, in case of gross abuse of good faith between the parties, a dissolution will be decreed, but only in strong cases. So, in some instances, the court will interfere to stay waste and to enjoin one partner from gross abuse of the rights of the others. —3 Kent, 601.

The power of one partner to bind the firm ceases, immediately on its dissolution. Either of the former partners can receive payment of debts due to the firm and give a release —19 Johns. 143.

On the dissolution by death, the surviving partner settles the affairs of the concern ordinarily.—3 Kent, 63.

Each party may insist on a sale of the joint stock; and when a court winds up the concern, it is done by a sale of the property, and a conversion of it into money. And when the partner in possession of the capital continues the trade with the joint property, he will be bound to account.—7 Conn. R. 11.

Partnership effects cannot be taken by attachment, or sold on execution, to satisfy a creditor of one of the partners only, except it be to the extent of the interest of such partner in the effects, after the settlement of all accounts.—16 Johns. 102.

Due notice of the dissolution must be given, and a firm may be bound, after the dissolution of a partnership, by a contract by one partner in the usual course of business, in the name of the firm, with a person who contracted on the faith of the partnership, and had no notice of the dissolution. —4 Paige, 17.

The weight of authority seems now to be, that notice in one of the usual advertising gazettes of the place where the business was carried on, and published in a fair and usual manner, is not presumptive evidence, merely, but conclusive, as to all persons who have not been previous dealers with the firm.—3 Kent, 67. But as to persons who have previously been in the habit of dealing with the firm, it is requisite that actual notice be brought home to the creditor, or at least, that it be given under circumstances from which actual notice may be inferred, which generally will be a mixed question of law and fact to be submitted to a jury under the direction of the court.—*Ibid.*

When a dissolution has taken place, one partner is not to be bound by instruments negotiated by the other in the name of the original firm, after such dissolution, notwithstanding they are negotiated by the partner authorized to settle the partnership business.—*Hamilton et al.* vs. *Seaman et al.*, 1 Carter's Ind. Rep. 185.

If, after the dissolution of a partnership between A. & B., the parties agree that the former shall pay, with his own funds, *certain* debts of the latter, and certain debts of the firm, in discharge of a note, which, previously to such agreement, had been given by A. to B., and the payments be accordingly made, such payments, to the amount of the private debts of B., and of half of the partnership debts, thus paid, constitute a good defense to a suit at law on the note.—*Griffith* vs. *Hill*, 7 Blackf. 324.

Assumpsit by partners for work and labor. *Held*, that evidence of the statements of one of the partners, made after the dissolution of the partnership, so far as they tended to show a new contract destroying the partnership claim, and giving to each partner a separate demand for his part of the debt,

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was not admissible; but that the statements of such partner, so far as they showed a payment made to himself, might be proved.—*Lefavour et al.* vs. *Yandes et al.*, 2 Blackf. 240.

Assumpsit in the name of A. and B. against C, for work and labor performed by the plaintiffs as partners. The defendant offered to prove admissions, made by one of the plaintiffs after the partnership was dissolved, tending to show that, after the dissolution, the parties had made a different contract respecting the payment of the work, than that under which the work had been done. *Held*, that the evidence was inadmissible.—2 Blackf. 371.

PATENTS.

If the assignment of a patent right be not recorded in the office of Secretary of State of the United States, a note given to the assignees for such right is invalid for want of consideration.—*M'Fall et al.* vs. *Wilson et al.*, 6 Blackf. 260.

The exclusive right of property in the invention of, or improvements on, any new and useful art, machine, &c., is the creature of statutory law, and must be strictly regulated by its provisions.—*Higgins* vs. *Strong et al.*, 4 Blackf. 182.

The assignment of a patent-right is not valid, unless the assignment be recorded in the office of the Secretary of State of the United States; and a note given to an assignee for such a right, whose assignment had not been so recorded, is invalid for the want of consideration.—*Ibid.*

The taking of the oath required by the patent act, previous to the issuing a patent, is but a pre-requisite to the granting of a patent; and in no degree essential to its validity: and if not taken, still the patent is valid.—*Whittemore* vs. *Cutter*, 1 Gallis. C. C. R. 429.

No defect or concealment in the specification, will avoid the patent, unless it arose from an intention to deceive the public.—*Ibid.*

The first inventor is entitled to the benefit of his invention, if he reduce it to practice, and obtain a patent therefor; and a subsequent inventor cannot, by obtaining a patent, oust the first inventor of his right, or maintain an action against him for the use of his own invention.—*Woodcock* vs. *Parker et al.*, 1 Gallis. C. C. R. 438.

If the machine for which the patent was obtained substantially existed before, and the plaintiff made an improvement only thereon, he is entitled to a patent for the improvement only, and not for the whole machine: and where, under such circumstances, the patent comprehends the whole machine, it is too broad, and therefore void.—*Ibid.*

It is not necessary to defeat the plaintiff's patent, that a machine should previously have existed in every respect similar to his own; for a mere change of former proportions, will not entitle a party to a patent.—*Ibid.*

If he claim a patent for the whole machine, it must in substance be a new machine; that is, it must be a new mode, method, or application of mechanism, to produce some new effect; or to produce an old effect in a new way.—*Ibid.*

If one who has invented merely an improvement, take out a patent for the whole machine, his patent is too broad, and utterly void.—*Whittemore* vs. *Cutter*, 1 Gallis. C. C. R. 478.

Where a specific machine already exists, producing certain effects, if a

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mere addition is made to such machine, to produce the same effect in a better manner, a patent cannot be taken for the whole machine, but for the improvement only.—*Ibid.*

In like manner, if to an old machine some new combinations be added to produce new effects, the right to a patent is limited to the new combinations.—*Ibid.*

A patent can, in no case, be for an effect only, but for an effect produced in a certain manner or by a peculiar operation. For instance, no patent can be obtained for the admeasurement of time, or the expansive operations of steam; but only for a new mode or new application of machinery to produce these effects: and, therefore, if new effects are produced by an old machine, in its unaltered state, no patent can be legally supported, for it is a patent for an effect only.—*Ibid.*

On the other hand, if well known effects are produced by machinery, in all its combinations entirely new, a patent may be claimed for the whole machine.—*Ibid.*

So, if the principles of the machine are new, either to produce a new or an old effect, the inventor may well entitle himself to the exclusive right of the whole machine.—*Ibid.*

By the principles of a machine, as those words are used in the statute, is not meant the original elementary principles of motion which philosophy and science have discovered, but the modus operandi, the peculiar device or manner of producing any given effect. The expansive power of steam, and the mechanical powers of wheels, have been understood for ages; yet a machine may well employ either the one or the other, and yet be so entirely new in its method of applying them, as to entitle a party to his patent for his whole combination.—*Ibid.*

It is not sufficient to give validity to a patent, that the specific machine, with all its combinations and effects, did not exist before; for if the same effects were all produced by the application of machinery in separate parts, and the party merely combined them together, or added a new effect, the combination would not sustain the patent; as the artist who added a second hand or repeater to a watch, could not have been entitled to a patent for the whole watch.—*Ibid.*

Nor will the patent be protected if the patentee was the inventor of all the material improvements in the old machine, if he suffered them to be used, fully and freely, by the public at large, combined with all the usual machinery; for in such case he must be deemed to have made a gift of them to the public.—*Ibid.*

The original inventor of a machine is exclusively entitled to a patent for it. Mere colorable differences or slight improvements, will not affect his rights.—*Odiorne* vs. *Winkler*, 2 Gallis. C. C. R. 51.

If another person invent an improvement on such machine, he can entitle himself for a patent to the improvements only, and does not thereby acquire a right to patent and use the original machine: and if he obtain a patent for the whole machine, and not for the improvement only, his patent is too broad, and therefore void.—*Ibid.*

The material question in patent causes, is not whether the same elements of motion, or the same component parts are used, but whether the given effect is produced substantially by the same mode of operation, and the same com-

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bination of powers in both machines. Mere colorable differences, or slight improvements, cannot shake the right of the original inventor.—*Ibid.*

By the expression "true inventor," in the statute, is undoubtedly meant the sole and exclusive inventor: for, if the machine were the joint invention of several persons, neither of them could claim to be the true inventor, having an exclusive right to the patent; but the interest would be a joint or common interest in the whole. In such a case, therefore, if a party were to obtain a patent for the invention, having sworn that he was the true inventor, he would, in the language of this act obtain it upon "false suggestions;" as such false suggestion would be a surprise and fraud upon the government, it might well also be declared to be obtained "surreptitiously."—*Stearnes* vs. *Barrett*, 1 Mason's C. C. R. 153.

The law allows a party a patent for a new and useful invention: and by "useful invention," is meant, not an invention, in all cases superior to the modes now in use for the same purpose, but useful in contradistinction to frivolous and mischievous inventions.—*Lowell* vs. *Lewis*, 1 Mason's C. C. R. 182.

The patentee must describe in his patent in what his invention consists, with reasonable certainty, otherwise it is void for ambiguity. If it be for an improvement in an existing machine, he must, in his patent, distinguish the new from the old, and confine his patent to such parts only as are new; for if both are mixed up together, and a patent is taken for the whole, it is void.—*Ibid.*

But if the invention is definitely described in the patent, so as to distinguish it from what is before known, the patent is good, although the specification does not describe the invention in such full and exact terms, that a person skilled in the art and science of which it is a branch, would construct or make the thing invented: unless such defective description or concealment were with intent to deceive the public.—*Gray* vs. *Osgood*, Peters' C. C. R. 394.

As among inventors, he who is first in time has a prior exclusive right to the patent for the invention.—*Ibid.*

By "useful invention," in the patent act of the United States, is meant an invention which may be applied to a beneficial use in society, in contradistinction to an invention which is injurious to the morals, the health, or the good order of society.—*Bedford* vs. *Hunt et al.*, 1 Masons' C. C. R. 302; *Kneass* vs. *The Schuylkill Bank*, 4 Wash. C. C. R. 9.

It is not necessary that the invention should be of such general utility, as to supersede all other inventions previously in practice to accomplish the same purpose.—*Bedford* vs. *Hunt et al.*, 1 Masons' C. C. R. 302.

Nor is it important that its practical utility should be very limited, for the law does not look to the degree of utility.—*Ibid.*

A joint patent may be well for a joint invention, but not for a sole invention of one of the patentees; if each of the patentees obtain separate patents for the same invention, as his exclusive invention, and afterwards both obtain a joint patent for the same as their joint invention; they are estopped by the joint patents from asserting any title under the several patents.—*Barrett et al.* vs. *Hall et al.*, 1 Mason's C. C. R. 447.

If several patents are taken out by several patentees for a several invention, and the same patentees afterwards take out a joint patent for the same, as a joint invention, the parties are not absolutely estopped from asserting

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the invention to be joint; but the former patents are very strong evidence against a joint invention.—*Ibid.*

A patent cannot embrace various distinct improvements or inventions, but in such case the party must take out separate patents: and if the patentee has invented certain improved machines, which are capable of a distinct operation, and also has invented a combination of those machines to produce a connected result, the same patent cannot at once be for the combination and for each of the improved machines; for the inventions are as distinct as if the subjects were entirely different.—*Ibid.*

If the patent be for an improved machine, or for an improvement of a machine, for the meaning of the terms is substantially the same; then the patent must state in what the improvement specifically consists, and it must be limited to such improvement.—*Ibid.*

If, therefore, the terms be so obscure or doubtful that the court cannot say which is the particular improvement which the patentee claims, and to what it is limited, the patent is void for ambiguity; and if it covers more than the improvement, it is void, because it is broader than the invention.—*Ibid.*

Where a combination of machinery already exists, up to a certain point, and the patentee makes an addition or an improvement to the machinery, he must confine his patent to the improvement.—*Ibid.*

If an invention consist in a new combination of machinery, or in improvements upon an old machine, to produce a new effect, the patent should be for the combined machinery, or improvements on the old machine; and not for a mere mode or device for producing such effects, detached from the machinery. —*Ibid.*

An inventor cannot, under the patent laws of the United States, have two subsisting valid patents, at the same time, for the same invention. The first that he obtains while it remains unrepealed, is an estoppel to any future patent for the same invention, founded upon the general patent act.—*Odiorne* vs. *The Amesbury Nail Factory*, 2 Mason's C. C. R. 28.

Where a patentee in his specification, states and sums up the particulars of his invention, and his patent covers them, he is confined to such summary; and he cannot afterwards be permitted to sustain his patent, by showing that some part which he claims, in his summing up, as his invention, though not in fact his invention, is of slight value or importance in his patent. His patent covers it; and if it be not new, the patent must be void.—*Moody* vs. *Fisk et al.*, 2 Mason's C. C. R. 112.

An invention or improvement for which a patent has been obtained, must be useful within the meaning of the patent law, or the patent is void.—*Langdon* vs. *De Groot et al.*, Paine's C. C. R. 203.

Whether the usefulness of an invention be matter of fact to be left to the jury, or whether the court is to decide it as a matter of law? *query*—*Ibid.*

It seems, however, that if, on the plaintiff's own showing, the invention appears to be useless, and an imposition on the public, the court should so direct the jury.—*Ibid.*

An invention of an ornamental mode of putting up thread, which gave it no additional value, but merely made it sell more readily at retail, and for a larger price, is not a useful invention within the meaning of the patent law. —*Ibid.*

Under the patent act of February 21, 1793, ch. 156, a patent is valid, although the invention may have been in use for years anterior to the date of

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the patent, if the patentee was the inventor.—*Goodyear* vs. *Mathews*, Paine's C. C. R. 300. Contra, *Pennock* vs. *Dialogue*, 2 Peters, 16.

A patent for an entire machine is valid, although the invention consists only of an improvement on such machine; but the patentee is entitled to an exclusive use of no more than his improvement.—*Ibid.*

The first section of the patent act of February 21, 1793, ch. 156, construed in connection with the other sections of the act, means that the invention should not be known or used as the invention of any other person than the patentee, before the application for the patent.—*Morris* vs. *Huntington*, Paine's C. C. R. 348.

If the invention has got into use while the inventor was practising upon it, with a view to improve it before applying for a patent, such use does not invalidate the patent; and the motive for the delay is a question for the jury. —*Ibid.*

A patent for an improvement should describe the machine in use, that it may be known in what the improvement consists.—*Sullivan* vs. *Redfield et al.*, Payne's C. C. R. 441.

One had patented "a new and useful improvement in the steam tow-boat," but the specification did not mention the invention as an improvement, but simply described a tow-boat. *Held*, that the specification was broader than the patent, and therefore bad.—*Ibid.*

The invention should be so clearly described as to enable the public to put it in use.—*Ibid.*

The specification describes the invention as "consisting essentially in attaching the packet to the steamboat with ropes, chains or spars, so as to communicate the power of the engine for the towing vessel to the vessel taken in tow, and kept always at a convenient distance; the manner of applying the power varying with the circumstances, in some measure." *Held*, bad for uncertainty.—*Ibid.*

To obtain a patent under the laws of the United States, the party must be the original inventor, in reference to the whole world; it is not sufficient that he be the first inventor in the United States.—*Rutgen* vs. *Kanowers et al.*, 1 Wash. C. C. R. 168.

The court has no doubt that the assignment of an exclusive right to make and use, and to vend to others, planeing machines, within a given territory, authorizes the assignee to send elsewhere, out of the said territory, the planks, boards, and other materials, the product of the said machine.—*Sampson et al.* vs. *Wilson*, 4 Howard, 711.

One who has patented his invention, cannot take out a new patent for the same invention, until the first is surrendered, repealed, or declared void.—*Morris* vs. *Huntington*, Paine's C. C. R. 348.

The holder of a defective patent may surrender it to the department of state, and obtain a new one, which shall have relation to the emanation of the first. —*Shaw* vs. *Cooper*, 8 Peters, 292.

A second patent granted on the surrender of a prior one, being a continuation of the first, the rights of a patentee must be ascertained by the law under which the original application was made.—*Ibid.*

The recording within three months according to the statute, is merely directory; and any subsequent recording of an assignment will be sufficient to pass the title to the assignee, except as to intermediate bona fide purchasers, without notice.—*Brooks* vs. *Byam*, 2 Story's C. C. R. 525.

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A patentee cannot, by a surrender of his patent, affect the rights of third persons, to whom he has previously assigned his interest in the whole or a part of the patent, unless the assignee consent to the surrender.—*Woodworth* vs. *Stone*, 3 Story's C. C. R. 749.

The extension of a patent may be granted to an administrator.—*Washburn* vs. *Gould*, 3 Story's C. C. R. 122.

PAYMENT.

(See R. S., vol. 2, pp. 45, 123.)

Payment is the fulfillment of a promise; and may be made by an agent in any mode accepted by the creditor.—3 Chit. Com. Law, 204. It may also be made by a third person, a stranger to the contract.—*Ibid.* It must be made to the creditor himself, or to his assignees, if known, or some person authorized by him, either expressly or by implication.—1 Stark. Ca. 233. But it may be good even when made to a person to be under no authority to receive it, if the creditor should afterwards ratify.—*Ibid.* When no time is mentioned the payment is due immediately.—4 Rand. 346. Where goods had been sold at six or nine months, the debtor had the option as to these terms.—5 Taunt. 338. Payment must be made at the place agreed upon; and in the absence of such agreement, it must be made agreeably to the presumed intention of the parties, which, among other things, may be ascertained by the nature of the thing to be paid or delivered, or by the custom in such cases. To make a valid payment so as to compel the receiver to take it, the whole amount due must be paid.—Poth. Obl. n. 499.

A person holding several notes payable to himself and others, and also a note as agent of B., the payee (all of which notes were made by the same persons), received payment in part from the makers, nothing being said as to the appropriation of the payment. In a suit afterwards brought by B. on the note of which he was payee, it appeared that no part of said payment had been received by him, and that no part of it had been specifically applied to the notes. *Held*, that the defendants could not, on the trial, claim that any part of said payment should be applied to the note sued on.—*Taylor et al.* vs. *Jones*, 1 Carter's Ind. Rep. 17.

Joint judgment debtors are not liable for payment made by a stranger at the request of one of said debtors.—*Chrisman et al.* vs. *Long*, 1 Carter's Ind. Rep. 212.

No assumpsit can be raised on the voluntary payment by a stranger of the debt of another person.—*Ibid.*

A person who owes money on different contracts, has a right to apply his payments to which of the debts he chooses; but if he fail to elect, the creditor may make the application—*Howland* vs. *Rench et al.*, 7 Blackf. 236.

The application of payments may be proved by circumstances as well as by words.—*Ibid.*

The payment of a debt in treasury notes of the State at par, which had recently depreciated in value, is good, if the payee did not know of the depreciation, or if both parties know, or had the same means of knowing, the value of the notes, and the payment was made in good faith.—*Ridenour et al.* vs. *M'Clurkin*, 6 Blackf. 411.

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PRINCIPAL AND AGENT.

I.—*By what acts an agency is created.*

The authority of an agent may be created by writing or verbally.—4 Johns. Ch. R. 667.

The agency may be inferred from the relations of the parties, and nature of the employment, without proof of any express appointment.—15 East. R. 400.

If the agency is to transfer real estate, the appointment must be in writing.—6 Serg. & Rawl. 331.

By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other in the capacity of his agent. Where a person sent his servant to a shop-keeper for goods upon credit, and paid for them afterwards, and sent the same servant again to the same place for goods, with money to pay for them, and the servant received the goods and embezzled the cash, the master was held answerable for the goods; for he had given credit to his servant by adopting his former act.—2 Kent, 614.

A person whom a man puts in his place to transact his business of a particular kind, is a general agent; and such authority empowers the agent to bind the employer by all acts within the scope of his employment; and that power cannot be limited by any private order or direction, not known to the party dealing with the agent.—3 Blackf. 436.

One who, for his services, is to share in the profits, but not losses of an enterprise, and who acts only under employment, is an agent.—20 Ohio R. 144.

Upon abandonment for loss, the master of a boat becomes agent for the underwriters; until then he is agent of the assured.—20 Ohio Rep. 214.

Where B. gave to W. a memorandum in writing, substantially setting forth that B. had received 175 dollars as an advance to buy barley for W., and B. agreed to deliver at a certain place, within a certain time, and for a certain price, 1,000 bushels of merchantable barley, it is a contract of sale, and not an agreement constituting an agency.—20 Ohio R. 304.

II.—*Relative rights, &c., of principal and agent.*

The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions. But an agent, constituted for a particular purpose, and under a limited power, cannot bind his principal if he exceed his power.—15 Johns. R. 44. The special authority must be strictly pursued.—5 Yerger's Tenn. R. 71. Whoever deals with a special agent, deals at his peril, when the agent passes the precise limits of his power.—*Ibid.*

If A. authorize B. to buy an estate for him, at 50 dollars per acre, and he give 51 dollars an acre, A. is not bound to pay that price; but the better opinion is, that if B. offer to pay the excess out of his own pocket, A. is then bound to take the estate.—*Ibid.*

The agent becomes personally liable only where the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or where he exceeds his power.—11 Mass. 29. But if a person would excuse himself from responsibility on the ground of

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agency, he must show that he disclosed his principal at the time of making the contract. And if the agent buy in his own name, but for the benefit of his principal, and without disclosing his name, the principal is also bound, as well as the agent, provided the goods come to his use, or the agent acted in the business entrusted to him according to his power.—12 Wend. 413.

If the agent bind himself personally, and engage expressly in his own name, he will be held responsible, though he should in the contract give himself the description or character of agent.—13 Johns. 307.

If an agent, on behalf of government, make a contract, and describe himself as such, he is not personally bound.—1 Greenl. R. 231.

An agent, without authority from the principal, cannot appoint a sub-agent to do the business.—2 Kent, 633.

By the custom of trade, an agent may have a lien upon the property of his employer in his possession, for a general balance of accounts, as well as for expenses incurred in taking care of the property.—*Ibid.*

The principal may call his agent to an account at *any time;* and may recover full indemnity for all injuries sustained by reason of the positive misconduct or negligence of the agent, or by his transcending his authority.—12 Pick. 328.

The principal is bound to reimburse the agent all expenses he may have lawfully incurred about the agency; to pay him his commission agreed upon, or according to the usage of trade; and to indemnify him for damages sustained by reason of the principal's conduct.—Story Ag. sec. 335.

If credit be given to an agent of government, and not to the government, the agent himself will be liable.—2 N. H. Rep. 352.

A factor cannot sell the property of his principal to a firm of which he is a member.—8 N. H. Rep. 504.

A reasonable time for sale, in the due course of business, must elapse before a factor can demand reimbursement of his advances, and make a sale of goods consigned to him below the sum to which he is limited, if they have not been paid, or sustain a suit to recover them.—12 N. H. Rep. 239.

Where goods are consigned to a commission merchant, or factor, for sale at a certain limited price, and he makes advances on them, if the goods cannot be sold at the price limited, and the consignor, upon reasonable notice, neglect to repay the advances, the factor may sell the goods at the fair market value, although below the limit, and recover the balance of the advances, if any remain. —12 N. H. Rep. 239.

A ratification of part of an unauthorized transaction of an agent, or one who assumes to act as such, is a confirmation of the whole.—1 Comst. New York Rep. 433.

If an agent, appointed to sell lands, cause a conveyance to be made to himself, such conveyance, unless ratified by his principal, will, on application of the principal or his heirs, be set aside, without inquiry as to its fairness.—*Sturdevant* vs. *Pike,* 1 Carter's Ind. Rep. 277.

On setting aside such conveyance, the court should not proceed to determine the particular share to be relinquished to each heir, without first ascertaining and decreeing the share due to each, taking into consideration advances made, &c.—*Ibid.*

The contrary not being proved, it will be presumed that an agent selling lands for his principal, and receiving the purchase-money therefor, has retained sufficient thereof to compensate him for his services.—*Ibid.*

An agent employed to collect an account, receive payment, and receipt therefor, has no authority to give a discharge upon the receipt of a note for the amount payable to himself; and if he do so, and assign the note, and the assignee

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sue the payee, and if the principal also sue on the account, a bill of interpleader cannot be sustained by the debtor.—*Corning* vs. *Strong*, 1 Carter's Ind. Rep. 329.

An agent for attending to and managing a grocery-store, &c., is not, in consequence of such agency, authorized to draw or indorse notes in the name of the principal.—*Smith et al.* vs. *Gibson*, 6 Blackf. 369.

An agent is not liable to a suit for money collected for his principal, unless it have been previously demanded.—*Armstrong* vs. *Smith*, 3 Blackf. 251.

An action does not lie against an agent or factor for not accounting, until after a demand to account.—*Judah* vs. *Dyott*, 3 Blackf. 324.

The statute of limitations in such action does not begin to run until a demand has been made.—*Ibid.*

The declarations of an agent, at the time of making a contract for his principal, may be proved to show the character in which the contract was made, but they are not evidence to prove the agency; nor are the agent's declarations, made subsequently to the contract, admissible as evidence for any purpose.—*Tomlinson et al.* vs. *Collett et al.*, 3 Blackf. 436.

In an action against the principal for the price of goods bought for him by an agent, the delivery of the goods to the agent may be proved, without calling him as a witness, or accounting for his absence.—*Ibid.*

The agent of a company of persons engaged in digging for salt water, who has the general superintendence of their works, may contract debts in their name which will be binding upon them, for such articles as may be suitable for the boarding and clothing of the hands employed at the works.—*Ibid.*

An agent who has only authority to receive payment of a debt, cannot bind his principal by any arrangement short of an actual collection of the money.—*Kirk et al.* vs. *Hiatt et al.*, 2 Carter's Ind. Rep. 322.

An agent is not liable to a suit for money collected for his principal, unless it have been previously demanded.—*Phillips* vs. *Wills*, 2 Carter's Ind. Rep. 325.

An agent employed to sell, cannot make himself the purchaser.—13 Ves. 103. And if he be employed to purchase, he cannot be the seller.—2 Camp. 203.

An agent is bound to use, in the execution of his trust, the utmost diligence and care.—2 Wills. 325.

An agent is not liable in cases of robbery, fire, or any other accidental damage happening without his default.—2 Mod. 100.

A loss, occasioned by an unauthorized disposal or adventure of the principal's money, and not prescribed by the usage of business, though intended for his benefit, is chargeable to the agent.—1 Kinnie, Com. 42.

The principal will be held implicated to the fullest extent, in what his agent does, within the scope of what he expected him to do, or for that which he knew he had done, if he persist in taking the benefit of the act.—21 Vermont R. 129.

Where it distinctly appears in the body of a parol agreement, signed by an agent in his own name, without the addition of the name of the principal, that the principal is the contracting party, the agreement will be construed to be that of the principal, and not of the agent.—1 Dougl. Mich. Rep. 106.

The rule that an attorney or agent, to bind his principal, must sign the name of the principal, applies only to deeds, and not to simple contracts.—*Ibid.*

III.—*How terminated.*

An agency may terminate by the death of the agent; limitation of the power to a particular time; execution of the business which the agent was constituted to perform; by a change in the state or condition of the principal; by the principal's express revocation of the power; and by the principal's death.—2 Kent, 643.

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REPLEVIN.

(See ante, R. S., vol. 2, p. 54.)

SEDUCTION.

(For Criminal Action, see ante, R. S., vol. 2, p. 491.)

I.—*Who may maintain the action.*

The common law rules in reference to who may maintain an action for seduction, are changed by the provisions of the new code. An unmarried female may prosecute as plaintiff an action for her own seduction, and may recover therein such damages as may be assessed in her favor. At the same time her father, or in case of his death or desertion of his family, or imprisonment, the mother may prosecute the action. The daughter need not be living with the plaintiff, and it is not necessary to prove a loss of services to the plaintiff. (R. S., ante, vol. 2, p. 33.) This rule applies to the case of the father or mother; and where the relation of master and servant exists, and there is an actual loss of services, the master may maintain the action for the real damages. The relation of master and servant does not exist between the step-father and step-daughter, he not being entitled to her services, nor liable for her support. And when a step-daughter leaves the house of her step-father and is seduced while in the service of a third person, the step-father cannot maintain an action for the seduction, though before the birth of the child she returns to his house, engages in his service, and is there nursed and attended during her confinement. —4 Coms. N. Y. Rep. 38.

The action may also be prosecuted by the guardian of the female, and in such case the damages shall inure to the ward.—R. S., vol. 2, p. 33.

Quære, where an unmarried female in the service of persons other than her parents, is seduced, may there not be three actions for the same cause, prosecuted at the same time, by the provisions of the Civil Code, ante, R. S., vol. 2, p. 33, in connection with the well established common law rule that the master may maintain an action for the loss of the services of his servant;—by the daughter in her own behalf; by the father or mother without reference to loss of services or whether the daughter lived with him or her mother; and by the master for loss of services? This is the manifest inference from the premises. And, upon the failure of the female to prosecute, if there be a guardian, he may maintain the action for her benefit, but surely not when there is pending a prosecution by her for the same cause.

At common law the action may be maintained by a stranger for the seduction of an adopted child.—11 East. 23.

A father who permits a married man to visit his daughter as a suitor, cannot maintain an action against him for seducing her; in fact, if the father be the plaintiff, and he has misconducted himself, he cannot prosecute the action.—3 Stephens's N. P. 2353.

II.—*The Evidence and Damages.*

The female, herself, when a parent or master brings the action, may be a witness, and other witnesses may be asked whether they had an opportunity of observing the conduct of the plaintiff and her daughter; and if so, whether they had known them to be guilty of any impropriety of conduct?—3 Stephens's N. P. 2354.

In an action for seduction, the daughter is not bound to answer, on cross-

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examination, whether she had not been previously criminal with other men.—3 Camp. 519.

Proof of a promise of marriage, and that the defendant had persuaded the daughter to destroy her offspring, and had spoken to her about hiring a nurse and other arrangements in contemplation of marriage, may be admitted.—Ros. Ev. 484.

The damages, when the action is prosecuted by the female herself, her father or mother, or guardian, are not limited to actual, but may be exemplary. (R. S., vol. 2, p. 33.) But when it is prosecuted by a master of a female who is seduced, he can only recover such damages as he actually sustains by loss of her services, &c.

In an action of seduction of the plaintiff's daughter, the defendant may examine witnesses to prove particular acts of sexual intercourse between the plaintiff's daughter and those witnesses, who may each be asked as to the fact, and the time and place of its occurrence; but if the jury are of the opinion that the defendant had such intercourse with the plaintiff's daughter as caused him to be the father of the child, the plaintiff is entitled to a verdict, and the evidence of her unchastity with others, is only to be considered in mitigation of damages.—3 Stephens's N. P. 2355.

Evidence may be given in aggravation of damages, that the defendant visited the plaintiff's house for the purpose of paying his addresses to the daughter with an intention of marriage. (Id. 2356.) For this purpose, also, the plaintiff may prove the amount of expenses sustained by his daughter's confinement, the amount of physician's bill, if paid, &c.—*Id.*

In seduction, the previous respectability of the plaintiff's family, &c., may be proved to increase the damages. Supposing the daughter to have been unchaste, and the alleged carnal intercourse to have been occasioned as much by her misconduct as that of the defendant, the latter would not have been guilty of seduction. That would be a case of criminal connection without seduction, and one in which, though the suit for loss of services could be sustained, the damages would not be aggravated on the ground of seduction.—*Hill* vs. *Wilson*, 8 Blackf. 123.

In an action to recover damages for the seduction of a daughter, proof of the condition in life and pecuniary ability of both the plaintiff and defendant, is properly admitted to go to the jury. In such an action, the father may not only recover the damages he has sustained by loss of service, and the payment of necessary expenses, but the jury may award him compensation for the disgrace cast upon his family, and the loss of the society and comfort of his daughter.—3 Scam. Ill. Rep. 373.

SEQUESTRATION.

[See ante, R. S., vol. 2, p. 158.]

The process of sequestration is a writ of commission sometimes directed to the sheriff, but most usually, to four or more commissioners of the complainant's own nomination, authorizing them to enter upon the real or personal estate of the defendant, and to take the rents, issues and profits into their own hands, and keep possession of, or pay the same as the court shall order and direct, until the party who is in contempt shall do that which he is enjoined to do, and which is specially mentioned in the writ.—1 Harr. Ch. 191.

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STOPPAGE IN TRANSITU.

This is the right which the vendor has, when he sells goods on credit to another, of recovering possession of the goods while they are in the hands of a carrier or middle man, in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent. It exists only as between the vendor and vendee.—2 Kent, 540.

If the price be paid or money tendered, the vendor cannot stop the goods for money due for them, nor can he stop them for money due on other accounts.—*Ibid.*

If the vendor has been paid in part, he may stop the goods for the balance due.—3 East, 93.

The right to stop *in transitu* is paramount to any lien of a third party against the purchaser.—2 Kent, 541.

The right does not extend to any person who does not stand in the character of vendor or consignor, and rest his claim on a proprietor's right.—6 East, 371.

While the goods are on the transit, and the vendee becomes insolvent, the vendor may take them by any means not criminal.—2 Kent, 543. But the validity of the right depends entirely on the insolvency of the vendee.—*Ibid.*

A demand of the goods of the carrier, notice to him to stop the goods, an assertion of the vendor's right by an entry in a custom house, a claim or endeavor to get possession is equivalent to an actual stoppage of the goods.—2 Esp. Rep. 613.

The right is determined by an actual delivery to the vendee, or by circumstances which are equivalent to such delivery.—2 Kent, 543.

The delivery to a carrier or packer to and for the use of the vendee will not defeat the right. But if they have arrived at the warehouse of the packer used by the buyer as his own, or at a wharf where the goods of the vendee are usually landed, the right is extinguished.—1 Camp. R. 282.

If the goods have arrived at any intermediate place, where they are placed under the vendee's orders, and are to remain stationary, until they receive his directions to put them again in motion for some other destination, the right is at an end.—5 East Rep. 175.

If the property has once fairly arrived at its destination, so as to give the vendee the actual exercise of dominion over it, the right is gone.—4 Esp. R. 82.

If the delivery to a carrier or agent of the vendee be for the purpose of conveyance to the vendee, the right of stoppage continues; but if the goods be delivered to the carrier or agent for safe custody, or for disposal on the part of the vendee, and the middle man is, by agreement, converted into a special agent for the buyer, the right is gone.—2 Kent, 545.

TENANTS IN COMMON, &c.

[See ante, R. S., vol. 2, pp. 174, 243, 329.]

A tenancy in common is where an estate is held by two or more persons by unity of possession. The chief distinction between this tenancy and that of coparcenary at common law was that the latter was always created by descent, while the former was not. But in the United States the distinctions between the two are essentially extinguished.—6 Johns. R. 185; Nott & M'Cord, R. 380.

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Estates in common may be created by deed or will; by the destruction of a joint tenancy, if the tenants sever the possession; and by a proper limitation in a deed. They may be dissolved by uniting all the titles and interests in one tenant, and by partition.—4 Kent, 363.

Joint tenancies must be created by deed, and have the unities of interest, time, title and possession, and may be destroyed by a severance of any of the unities, by partition, &c.

TENDER.

A tender is an offer to do or perform an act which the party offering is bound to perform to the party to whom the offer is made. It must be made by a person capable of making; for if it be made by a stranger, without the consent of the debtor, it will be insufficient. It must be made to the creditor having capacity to receive it, or to his authorized agent. The whole sum due must be offered, in the lawful coin of the United States, or foreign coin made current by law; and the offer must be unqualified by any circumstances whatever. The offer should be made at the time agreed upon; if made afterwards, it only goes in mitigation, if made before suit brought. It must be made at the place agreed upon.—4 Camp. 156; 6 Taunt. 336; 8 East. 168; 1 Saund. 33; 1 Sell. 314.

A tender and refusal of the property (or that which is equivalent,) at the time and place fixed by the contract for its delivery, vests the property in the creditor, and puts an end to his right to sue upon the contract.—*Mitchell et al.* vs. *Merrill*, 2 Blackf. 87.

TRESPASS.

(See ante, R. S. vol. 2, p. 431.)

Trespass, in its most extensive sense, means any injury arising to one's person or property, from the misfeasance or act of another. The term is used here to designate a class of injuries, and not any distinct form of action.

I.—*Against the person.*

(See ante, R. S. vol. 2, p. 426.)

The least touching of another's person, be it ever so small, in an angry, or revengeful, or rude, or insolent manner; spitting in his face, or violently jostling him out of the way, is a battery.—1 Stephen's N. P. 209.

The degree of violence with which the act is done, does not make any difference. And this action is maintainable not only against the immediate party who commits the injury, but against him also at whose command the aggression is committed.—*Ibid.*

If a man wantonly do an act by which another is hurt, an action of assault and battery will lie, as if a person push a drunken man against another man, and hurt him.

If in trespass for an assault and battery, *son assault demesne* be pleaded, the plaintiff may, under the replication of *de injuria*, &c., prove that the defendant's battery was *excessive*.—*Fisher* vs. *Bridges*, 5 Blackf. 518.

Where the injury is unavoidable, and the conduct of the defendant faultless, no action can be maintained.—1 Bull N. P. 15.

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If the defendant prove that the plaintiff first lifted up his staff, and offered to strike him, it is a sufficient assault to justify his striking the plaintiff; and he need not wait till the plaintiff has actually struck him.—*Ibid.*

The defendant may justify in defense of his wife, or children; or he may plead that the plaintiff, with strong hand, endeavored forcibly to break and enter the defendant's close, whereupon the defendant resisted and opposed such entrance. —1 Stephen's N. P. 217.

A battery cannot be justified on account of breaking defendant's close, where the force is implied, without a request to depart; but a man may oppose force by force in defense of his possession, if necessary.—*Ibid;* 4 Mon. Ky. R. 135.

Trespass for an assault and battery. Plea, *son assault demesne.* Replication: 1st, *de injuria;* 2d, excess. The defendant having moved that the second replication be set aside, the court gave the plaintiff leave to select which replication he would retain. The plaintiff refused to make the selection, and the court granted the motion. Held, that there was no error in this proceeding. Held, also, that the plaintiff had no right, on the trial of said cause, to ask a witness whether, in his opinion, the fight would have occurred if the defendant had informed the plaintiff that he had a knife.—*Reese* vs. *Botton,* 6 Blackf. 185.

In an action for an assault and battery, evidence offered by the plaintiff that he complained of the injury, recently after it was received, is admissible.—*Yost* vs. *Ditch,* 5 Blackf. 184.

In an action for an assault and battery, though it appeared that the defendant had been prosecuted criminally for the same matter, and fined $250, which he had paid, held, that the plaintiff might nevertheless recover *exemplary* damages, if the jury thought proper to allow them.—6 Hill's R. 466.

In assault and battery, to entitle the defendant to give evidence of provocation in mitigation of damages, the provocation must be so recent and immediate as to induce a presumption that the violence done was committed under immediate influence of the feelings and passions excited by it.—19 Johns. 319.

II.—*Against personal property.*

The plaintiff must, at the time when the injury was committed to the goods, have had an actual or constructive possession, and also a general or qualified property therein.—8 Johns. 432. But if the general owner of a chattel part with the possession to another person, under a contract which entitles such person to an interest in the thing, though for a limited time, the owner cannot maintain an action for an injury done to it during such possession of the bailee.—4 Wash. C. C. R. 371. The finder of an article may maintain an action against any person but the real owner; and even a person not having a strict legal right, but being in possession, may support an action against any one but the legal owner. —2 Saund. 47. A bailee with a mere naked possession, coupled only with an interest as to remuneration, may support an action for an injury done the property, as a carrier, factor, pawnee, &c.—*Ibid.*

Trespass lies for a direct and violent injury to personal property, whether the act be done intentionally or through negligence.—*Schuer* vs. *Veeder,* 7 Blackf. 342.

Case also lies for such injury if it were occasioned by the defendant's *carelessness,* and the act were not wilfully done.—*Ibid.*

In trespass for taking away a yoke of oxen, the jury, in estimating the damages actually sustained by the plaintiff, ought not to add to the value of the oxen any amount for their services.—*Anthony* vs. *Gilbert,* 4 Blackf. 348.

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If the trespass have been committed with malice, insult, or deliberate oppression, the jury may join exemplary damages to the pecuniary loss.—*Ibid.*

Under a plea, in such suit, of property in a third person, evidence of such ownership at the time of the taking is admissible.—*Ibid.*

The defendant may show in mitigation of damages, under the general issue in this suit, that the goods, at the time of the taking, belonged to a third person, and that the plaintiff was not liable for them to the owner.—*Ibid.*

And *semble*, that, under such issue, evidence in bar of the suit may be adduced, showing that a third person owned the property, and that the defendant acted under his authority.—*Ibid.*

To maintain trespass *de bonis asportatis*, the plaintiff must have had, at the time of the trespass, the actual or constructive possession of the goods, or, at least, a general or special property in them, and a right to the immediate possession.—*Hume* vs. *Tufts*, 6 Blackf. 136.

If a person unlawfully injure the property of another, he is liable for the damage, without regard to the intention with which the act was committed.—*Amick* vs. *O'Hara*, 6 Blackf. 258.

A person who chases a horse out of his field with a large, fierce dog, commits an unlawful act, and is liable for any injury to the horse which that act occasions.—*Ibid.*

The owner of personal property cannot take it from the peaceable though wrongful possession of another by violence on his person.—*Andre* vs. *Johnson*, 6 Blackf. 375.

One who finds a horse wrongfully in his close, may turn him into the highway, without being a trespasser therefor.—6 N. H. Rep. 213.

Where the defendant drove the plaintiff's sheep out of the defendant's close, and to a considerable distance, to the injury of the plaintiff, it was held that the defendant was liable.—8 N. H. Rep. 404.

The jury, in trespass to personal property, cannot increase the amount of their verdict for the plaintiff, by an allowance of counsel fees.—*Young* vs. *Tustin*, 4 Blackf. 277.

The plaintiff in such suit cannot recover damages which are not implied by law from the wrong committed, unless they are specially stated in the declaration.—*Ibid.*

III.—*Against Real Property.*

(See ante, R. S., vol. 2, pp. 168, 431, 522.)

An action lies to recover damages for an illegal entry upon, or an immediate injury to, real property in the possession of the plaintiff.—3 Stephens's N. P. 2630.

It is not requisite to support an action for injuries to real property, that it should be fenced from the adjoining land, nor is it requisite that there should be a wrongful intent.—1 Campb. 497.

The term "close" is technical, and means the interest in the soil, or an imaginary line, which the law draws around every man's land. (*Ibid.*) The breaking through a man's "close" may not in itself be actionable, but the slightest injury resulting therefrom will make it so.—19 Johns. 381.

A. rented a field to B. to raise a crop of corn, and was to have twelve and a half bushels of corn per acre, or half of the crop standing in the field, as he should elect, for the rent; before the crop was made, C. became the owner of A.'s interest by assignment. B. received no notice of the manner in which A. would elect to receive the rent, and no division of the corn or field was made,

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and C. turned a number of hogs on the field. The court instructed the jury that the act of turning the hogs on the field was trespass. Held, that there was no error in this instruction.—*Lathrop* vs. *Rogers*, 1 Carter's Ind. Rep. 554.

Trespass *quare clausum fregit*. The land on which, &c. had been purchased by the plaintiff at sheriff's sale, and was vacant at the time of the sale, and when the sheriff's deed was executed. Held, that it was not essential to the plaintiff's recovery that he should have taken actual possession of the land before the commencement of the suit.—*Raub et al.* vs. *Heath*, 8 Blackf. 575.

A tree standing directly upon the line between adjoining owners, so that the line passes through it, is the common property of both parties, whether marked or not; and an action will lie if one cut and destroy it without the consent of the other.—12 N. H. Rep. 454.

A declaration in trespass for cutting down and carrying away the plaintiff's trees is good, without an averment that the land where the trees were growing belonged to the plaintiff.—*Grenour* vs. *Daniels*, 7 Blackf. 108.

A license, in such case, cannot be given in evidence under the general issue, but must be specially pleaded.—*Ibid.*

The action of trespass *quare clausum fregit* is local, and can be brought only in the county in which the trespass was committed.—*Ham* vs. *Rogers et al.*, 6 Blackf. 559.

The circumstance that such trespass was committed in one county by persons resident in another, does not authorize the *capias ad respondendum*, issued in the former county, to be directed to the sheriff of the latter.—*Ibid.*

The declaration in trespass *quare clausum fregit* charged the defendant with breaking the plaintiff's close, and then and there cutting down certain trees, &c. Held, that the breaking the close was the gist of the action, and the cutting down the trees only matter of aggravation.—*Rucker* vs. *McNeely*, 4 Blackf. 179.

Trespass for breaking the plaintiff's close and taking away his grain. Special plea, that the close was the freehold of A., and that by his license the defendant entered, &c. Held, that the plea was good. Held, also, that the facts contained in the plea might be given in evidence under the general issue.—*Rasor* vs. *Qualls*, 4 Blackf. 286.

IV.—*By Officers.*

An officer may be a trespasser by executing legal process in an illegal manner; where the court from whence it issues has no jurisdiction over the subject-matter; where the court has jurisdiction but the proceedings are defective and void; where the process has been misapplied, as where the officer has taken A.'s goods on an execution against B.; or, where the process has been abused.—2 Johns. Cas. 27; 1 Chit. Pl. 183.

It is a general rule that where the defendant has acted under regular process of a court of competent jurisdiction, it is a sufficient justification to him.—*Ibid.*

An execution legal on its face, and showing jurisdiction in the court that issued it, though it issued irregularly—even without a judgment—is a justification to the officer acting under it, notwithstanding he had notice of the irregularity.—*Gott* vs. *Mitchell*, 7 Blackf. 270.

To a declaration in trespass charging that the defendant assaulted, seized, violently pulled and dragged about, struck, and imprisoned the plaintiff, a plea justifying the arrest and imprisonment by virtue of legal process, is bad.—*Kreger* vs. *Osborn et al.*, 7 Blackf. 74.

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The plea in such case should show that the acts of violence were rendered necessary by the resistance of the plaintiff.—*Ibid.*

A *capias ad respondendum* issued by a justice of the peace, without an affidavit, against a person not a resident and householder of his county, operates as a summons, and does not justify an arrest and imprisonment.—*Ibid.*

A party who causes a magistrate to issue, and the magistrate who issues, legal process, are not responsible for the unlawful manner of serving it, unless they participate in the unlawful act.—*Ibid.*

It is not necessary to a constable's justification of an arrest, under a *capias ad respondendum* issued by a justice, that the writ be preceded by an affidavit. *Aliter*, if the justification be by the party or by the justice.—*Davis* vs. *Bush*, 4 Blackf. 330.

If a constable having levied an execution on the debtor's goods, refuse to permit him, he having a family, to retain 100 dollars' worth thereof as exempt from execution, but sell the same on the execution, he may be sued in trespass.—*Stephens et al.* vs. *Lawson*, 7 Blackf. 275.

If one of two judgment-debtors, who knows the judgment has been paid, procure a *fi. fa.* to issue on the judgment, and assist in its execution on the other's goods, he is liable in trespass to the party injured.—*Glover* vs. *Horton*, 7 Blackf. 295.

If an officer acting under a legal warrant abuse his authority, he becomes a trespasser *ab initio*.—*Jarratt et al.* vs. *Gwathmey*, 5 Blackf. 237.

An action of trespass does not lie against A., for procuring a justice's warrant to search the premises and arrest the person of B., on suspicion of felony, and thereby causing the search and arrest to be made, although A. acted maliciously and without probable cause; B.'s only remedy for the injury being an action on the case.—*Tuell* vs. *Wrink et al.*, 6 Blackf. 249.

The warrant of a justice of the peace commanding a constable to search the premises, &c., of *B. P. Tuell*, does not command or authorize the constable to search the premises, &c., of *Benjamin P. Tuell*.—*Ibid.*

A justice of the peace who issues a writ of domestic attachment, by which the goods of an absconding debtor are attached, without requiring a bond to be previously filed according to the statute—and the party who procures such writ to be issued without previously filing the bond—are trespassers, and liable as such to the party injured.—*Barkeloo* vs. *Randall et al.*, 4 Blackf. 476.

Trespass for breaking and entering the plaintiff's close and stable, and taking away two horses. Plea, that an execution of *fieri facias* against a third person was delivered to the sheriff, &c.; that the horses belonged to the execution-debtor, and were subject to the execution; that the sheriff, by virtue of the execution, and the defendants by his command, broke and entered into the close and stable and took the horses, &c. Replication, that the horses did not belong to the execution-debtor, but to the plaintiff. *Held*, on general demurrer, that the replication was sufficient.—*M'Gee* vs. *Givan et al.*, 4 Blackf. 16.

A justification in trespass, under a judgment and execution of A., a justice, requires proof that A. is a justice.—*Hunter* vs. *Harris et al.*, 4 Blackf. 126.

Trespass against A. and B. for an assault and false imprisonment. A. pleaded not guilty. He also pleaded as follows: That at the time of the trespass, &c., he was a justice of the peace, &c.; that a felony had been committed, &c., by certain persons making, forging and counterfeiting, &c., (the particulars of the offense are here set out;) that, on, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that thereupon, afterwards, &c., the defendant being a justice of the peace as aforesaid, by reason of such felony having been

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committed, as aforesaid, and of such reasonable suspicion and belief that the plaintiff was so guilty—commanded said B. to arrest the plaintiff, and take him before some justice of the peace, &c.; that B., in pursuance of said command, gently laid his hands on the plaintiff, and took him before C., a justice of the peace, &c., to be dealt with, &c.; which is the same trespass, &c. A. also pleaded a second special plea which was similar to the first, except that it did not allege that he was a justice of the peace. Held, on general demurrer, that these special pleas of A. were bad for this reason, if no other, that they omit to set out the ground upon which the suspicion and belief of the plaintiff's guilt were founded.—*Wasson et al.* vs. *Canfield*, 6 Blackf. 406.

B., in said case, pleaded not guilty. He also pleaded as follows: That at the time of the trespass, &c., he was a constable, &c.; that a felony had been committed, &c., by certain persons making, forging, and counterfeiting, &c., (the particulars of the offense are here set out;) that afterwards, &c., a reasonable suspicion and belief existed that the plaintiff was guilty of said felony, and there was reasonable ground for such suspicion and belief; that one A. and others charged the plaintiff with being guilty of said felony, and informed this defendant, he being a constable, &c., the plaintiff was guilty; that afterwards, &c., this defendant, constable as aforesaid, by reason of said felony having been committed as aforesaid, and of such reasonable suspicion and belief that the plaintiff was guilty thereof, and of reasonable ground for such suspicion and belief, and of said charge and information of A. and others,—for the purpose of carrying the plaintiff before some justice of the peace to be dealt with, &c., gently laid his hands on the plaintiff, and took him before one C., a justice of the peace, &c., to be dealt with, &c; which is the same trespass, &c. B. also pleaded a second special plea which was similar to his first, except that it did not allege that he was a constable. Held, on general demurrer, that these special pleas of B. were bad for not showing that his informant stated the facts by which he knew or believed the plaintiff to be guilty, and for not setting out those facts.—*Ibid.*

Held, also, that a warrant illegal on its face, which had been issued by the defendant A. as justice of the peace, and under which the defendant B. had made the arrest, &c., and which had been referred to by the plaintiff's witness, was admissible evidence for the defendants in mitigation of damages.—*Ibid.*

Held, also, that the defendants might prove, in mitigation of damages, that at and shortly before the time of the arrest, &c., there was in the plaintiff's neighborhood an association of persons engaged in making and passing counterfeit money, &c., and that the plaintiff was generally reputed and believed there to have been one of that association; but that the facts that the plaintiff was one of that association, and had been engaged in passing counterfeit money knowingly, and with intent to defraud the public, should be specially pleaded.—*Ibid.*

To an action for false imprisonment against a justice of the peace and a constable, the defendants pleaded in justification, that an affidavit had been made before the justice, charging the plaintiff with having violently assaulted, beaten, and wounded the deponent, wherefore the justice had issued his warrant, &c. Held, that the plea was not objectionable, after a verdict in favor of the defendants, for not showing that the assault and battery were charged to have been *unlawfully* made.—*Cooper* vs. *Adams et al.*, 2 Blackf. 294.

A person arrested on a justice's warrant for a breach of the peace, cannot maintain an action of false imprisonment against the justice or constable, in consequence of a mere informality in the warrant, provided the justice have jurisdiction.—*Ibid.*

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If a judicial officer, whether possessed of a general or special jurisdiction, act erroneously or even oppressively in the exercise of his authority, an individual at whose suit he acts is not answerable, as a trespasser, for the error or misconduct of the officer. But if a judicial officer whose jurisdiction is special and limited, transcend his authority, and act in a case of which he has no cognizance, his proceedings are *coram non judice*, and no person can justify under them.—*Taylor* vs. *Moffatt*, 2 Blackf. 305.

The defendant, in an action of false imprisonment, justified under a writ of attachment ordered, at his instance by a circuit judge. The writ was issued against the plaintiff, for a contempt in disobeying a writ of injunction granted by the judge. The injunction was granted, and the writ of attachment was ordered and issued in vacation. Held, that the defense was insufficient; the judge having no authority, in vacation, to order the writ of attachment.—*Ibid.*

Trespass and false imprisonment. Plea, that the plaintiff, by his false representations respecting the circumstances of a third person, had induced the defendant, then in Louisiana, to sell there on a credit to such third person a boat laden with corn; that the plaintiff and the purchaser absconded without paying for the corn, and were fugitives from justice; that the defendant, for these reasons, made oath before a justice in this State, that the plaintiff and the purchaser had swindled him out of the price of his corn; that a warrant for swindling was accordingly issued by the justice against the parties complained of, upon which the plaintiff was arrested, taken before the justice, and by him committed to jail, which is the same trespass, &c. Held, on demurrer, that the plea was insufficient.—*Hall* vs. *Rodgers*, 2 Blackf. 429.

TRUSTS AND POWERS.

(See R. S., vol. 1, p. 501.)

VENDOR AND PURCHASER.

(See R. S. vol. 2, p. 214.)

WARRANTY.

(See R. S., vol. 2, p. 289, for remedy against heirs, &c., in case of warranty concerning lands; also, R. S., vol. 1. p. 234, for form of deed of warranty, &c.)

Warranties in reference to the sale of a chattel, are of two kinds, *express* and *implied*. An express warranty is one by which the warrantor undertakes to insure that the thing which is the subject of the contract, is or is not as there mentioned. An implied warranty the law implies by the fact of sale. For instance, the seller is understood to warrant the title of goods he sells when they are in his possession at the time of sale; but if they are not then in his possession, the rule of *caveat emptor*, or let the buyer beware, applies, and the buyer purchases at his risk.—2 Blacks. Com. 452.

If there is no express warranty by the seller, or fraud on his part, the buyer, who examines the article himself, must abide by all losses arising from latent defects, equally unknown to both parties.—20 Johns. 196. But if there be no opportunity for inspection, there is an implied warranty that the article shall answer the character called for, or be of the quality described, and saleable in the market and under that denomination.—3 Rawle's R. 23. This subject is extensively discussed in 2 Kent, 479.

When goods are discovered not to answer the order given for them, or to be unsound, the purchaser ought immediately to return them to the vendor, and

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give him notice to take them back, and thereby rescind the contract; or he will be presumed to acquiesce in the quality of the goods.—2 Kent, 480. In the case of a breach of warranty, he may sue upon it without returning the goods; but he must return them and rescind the contract in a reasonable time, before he can maintain an action to recover back the price. So it has been held that if the chattel have a defect fraudulently concealed, the vendee has his election, either to keep it, and sue for damages, or to return, or offer to return it within a reasonable time, and rescind the contract.—1 Dana's Ken. R. 30. The vendor after notice that the horse warranted sound is unsound, and an offer to return him, and the vendee sells him, is answerable for the difference of price, and the keep of the horse for a reasonable time. And if the vendee be sued for the price, the breach of warranty may be given in evidence in mitigation of damages.—2 Kent, 480, n.

Where an article is sold by sample, the warranty is, that the whole quantity answers the sample.—*Ibid.*

A power given by a seller of certain sacks of wool to a third person to weigh the same and deliver them to the buyer, does not authorize the agent to make any warranty, on the part of the seller, as to the quality of the wool.—*The Richmond Co., &c.* vs. *Farquar*, 8 Blackf. 89.

And such agent's report to the seller of his having attended to the weighing and delivery of the wool, is no proof of the seller's ratification of the warranty of which he was uninformed.—*Ibid.*

If wool sold in sacks be marked on the sacks and described in the invoice, by the authority of the seller, as being of a certain quality, there is a warranty by the seller that the wool is of that quality.—*Ibid.*

A., being in Illinois, bought there of B., the owner, a certain fanning-mill, which was in C.'s possession, in this State. The buyer paid the price at the time of the sale, and took the seller's order on C. for the mill. Held, that the sale, though actual possession was not given, passed the property in the mill to the buyer, and gave him a sufficient possession to maintain trespass against a person for taking it from C., after such sale.—*Legg et al.* vs. *Leyman et al.*, 8 Blackf. 148.

If the manufacturer of an article sell it at a fair market price, knowing the purchaser designs to apply it to a particular purpose, he impliedly warrants it to be fit for that purpose, at least against all defects not open and visible to the purchaser on inspection.—*Brenton* vs. *Davis*, 8 Blackf. 317.

The oral affirmation of a person as to the quality of an article sold by him, where the buyer had an opportunity of inspection, is not a warranty, unless it be so intended by the parties.—*Humphreys* vs. *Comline*, 8 Blackf. 516.

And whether such affirmation was intended to be a warranty, depends on the proof, and is a question for the jury.—*Ibid.*

Although such affirmation be false, it will not be considered fraudulent, unless it was known to be false by the party making it.—*Ibid.*

In the sale of molasses in barrels, at the market price to a grocer to retail, where the quality of the molasses is not examined, (the barrels being present at the sale,) there is no implied warranty that the molasses is fit for the purpose for which it is purchased.—*Ibid.*

The breach of an express warranty as to the soundness of a horse is, of itself, a valid ground of action; whether the suit be founded in tort or contract.—*House* vs. *Fort*, 4 Blackf. 293.

In the case of an express warranty, a *scienter* need not be proved.—*Ibid.*

In a suit on the warranty of the soundness of a horse, proof of the warranty and of the breach establishes the plaintiff's case; but an oral affirmation of the

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soundness of the horse, which was exposed at the time to the buyer's inspection, is not a warranty, unless it was so intended by both parties; and that intention must be shown to the satisfaction of the jury.—*Ibid.*

If a horse is warranted sound and wants the sight of an eye, an action lies; but a statement by the seller, that the horse's eyes are as good as any horse's eyes in the world, does not of itself amount to a warranty.—*Ibid.*

Representations as to the quality of property, made by the vendor pending a negotiation for its sale, are merged in an express warranty of such quality, made by him on the consummation of the contract of sale which results from such negotiation; and, unless the purchaser can prove that such representations were known by the vendor to be false when he made them, and thus establish fraud, he must rely solely upon the warranty for the remedy of any injury sustained in consequence of the falsehood of such representations.—1 Douglass's Mich. R. 51.

In executed contracts for the sale of personal property, where there is neither fraud nor express warranty, the purchaser takes the property at his own risk, as to its quality and condition.—1 Denio's N. Y. Rep. 378.

The case of a sale by sample, where a warranty is allowed to be implied, that the bulk of the article corresponds in quality with the sample exhibited, forms a well established exception to the general rule.—*Ibid.*

Where provisions are sold as merchandise, (and not for immediate consumption by the purchaser,) there is no implied warranty of soundness.—*Ibid.*

It seems that where provisions are sold for domestic use, the law presumes that the seller is acquainted with their quality, and he is liable to the purchaser if they turn out to be unwholesome.—*Ibid.*

If a wagoner by whom goods are sent to be delivered to another, sell them openly in a street, the sale vests no property in the purchaser, there being no *market overt* in this country.—8 Serg. & Rawle, 500.

Where a purchase of lands is made by metes and bounds, estimated to contain a specific quantity, or for "more or less," and a gross sum to be paid for the entire tract, the purchaser will not be entitled to an abatement in the price, should the number of acres fall short of the estimated quantity. More especially should the land, at the time of the purchase, be of equal value to the price paid.—20 Ohio Rep. 453.

Any misrepresentation or concealment on the part of the vendor, may take a case out of this rule.—*Ibid.*

Where a fact comes to the knowledge of the purchaser sufficient to put him on his guard, he is chargeable with notice.—20 Ohio Rep. 279.

A warranty that a fire engine sold and delivered would perform as well as any other in the western country, is not to be considered violated because the warranted engine is inferior to others in that country, much larger and more costly, if the inferiority be evident to a common observer.—7 Blackf. 102.

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